DEBATERS' HANDBOOK SERIES

FEDERAL CONTROL of INTERSTATE CORPORATIONS

DEBATERS' HANDBOOK SERIES

FEDERAL CONTROL OF INTERSTATE CORPORATIONS

DEBATERS' HANDBOOK SERIES

Enlargement of the United States Navy (3d ed. rev. and enl.)
Direct Primaries (3d ed. rev. and enl.)
Capital Punishment (2d ed. rev.)
Commission Plan of Municipal Government (3d ed. rev. and enl.)
Election of United States Senators (2d ed. rev.)
Income Tax (2d ed. rev. and enl.)
Initiative and Referendum (3d ed. rev. and enl.)
Central Bank of the United States
Woman Suffrage (2d ed. rev.)
Municipal Ownership (2d ed. rev. and enl.)
Child Labor (2d ed. rev. and enl.)
Open versus Closed Shop (2d ed.)
Employment of Women
Federal Control of Interstate Corporations (2d ed, rev. and enl.)
Parcels Post (2d ed. rev. and enl.)
Compulsory Arbitration of Industrial Disputes (2d ed. rev. and enl.)
Compulsory Insurance
Conservation of Natural Resources
Free Trade vs. Protection
Government Ownership of Railroads (2d ed. rev. and enl.)
Reciprocity
Trade Unions
Recall (2d ed. rev. and enl.)
World Peace
Government Ownership of Telegraph and Telephone
Single Tax Monroe Doctrine

HANDBOOK SERIES

European War
Agricultural Credit

Other titles in preparation
Each volume, one dollar net

Debaters' Handbook Series

SELECTED ARTICLES

ON

FEDERAL CONTROL OF INTERSTATE CORPORATIONS

COMPILED BY
EDITH M. PHELPS

Second and Enlarged Edition

WHITE PLAINS, N. Y. and NEW YORK CITY
THE H. W. WILSON COMPANY
1915

Published in 1911
Second Edition, 1915

EXPLANATORY NOTE FOR FIRST EDITION

This volume has been compiled for the especial benefit of students and debaters, and for libraries wishing to meet the demands of their patrons desiring reference material on this subject. It contains reprints of valuable material covering the general subject of government regulation of interstate commerce, and also the arguments for and against a federal charter for corporations engaged in interstate commerce. As the literature of the subject is practically inexhaustible, the bibliography has been limited to those articles which have a direct bearing on the subject as outlined in this volume, thereby avoiding the confusion that results when there is an overwhelming mass of material to be consulted. Students wishing to make a more extensive study, or to investigate the constitutional and legal aspects of the question, are advised to consult the various bibliographies which are listed elsewhere in this volume.

July, 1911. E. M. P.

EXPLANATORY NOTE FOR SECOND EDITION

Some important developments have occurred in the relations of our government to industry since the first edition of this handbook was published. The Court of Commerce established in 1910 was abolished in 1913 through the failure of Congress to make further appropriation for its maintenance. The Standard Oil and American Tobacco Companies were ordered to dissolve by the Supreme Court, and the United States Steel Corporation and other "trusts" were investigated. In 1914 President Wilson succeeded in obtaining from the Sixty-Third Congress two of the three laws sought for in his trust program, the Clayton Anti-Trust Bill and the Federal Trade Commission Bill. This volume has been enlarged by the addition of recent references and articles relating to the general subject of federal control of interstate corporations, and especially to federal incorporation and the new Trade Commission Bill.

January, 1915. E. M. P.

CONTENTS

BRIEF xi

BIBIOGRAPHY:

Bibliographies xv
General Works xvi
Magazine Articles:
General References xix
Affirmative References xxvii
Negative References xxix

INTRODUCTION 1

GENERAL DISCUSSION:

Bliss, William D. P. New Encyclopedia of Social Reform.. 5
Robinson, Maurice. H. Holding Corporation..Yale Review 12
Summary of Advantages and Evils of Combinations.....
.....United States. Industrial Commission. Reports 21
Johnson, Emory R. Trend of Governmental Regulation of
Railroads.....Annals of the American Academy 25
Beck, James M. Federal Power over Trusts.....
.....Annals of the American Academy 28
French, H. Findlay. Federal Control of Trusts and Combinations in Restraint of Trade..... 35
Johnson, Emory R. American Railway Transportation.... 40
McLean, Simon J. President Roosevelt and the Trusts....
..... Quarterly Review 44
Important Congressional Action: Railway Law....Outlook 45
Stickley, Gustav. How the Real Interests of the Railroads
Are Served by Restrictive Legislation.....Craftsman 46
Incorporation under Federal Law.....
.....Journal of Political Economy 52

Railway Regulation a Fact at Last....Current Literature 54
Jenks, Jeremiah W. Trust Situation.....National Conference on Trusts and Combinations, Proceedings, 1907 56
Report of the Commissioner of Corporations. 1904..... 65

Affirmative Discussion:

Cronan, John F. Plan for Regulating the Trusts..... North American 83
Marburg, Theodore. Governmental Regulation.....National Conference on Trusts and Combinations, Proceedings, 1907 89
McReynolds, S. Home of Trusts.....World's Work 93
Dill, James B. National Incorporation Laws for Trusts.. 96
Mather, Robert. Regulation of Transportation Rates..... National Conference on Trusts and Combinations, Proceedings, 1907 116
Low, Seth. National Control of Railways....National Conference on Trusts and Combinations, Proceedings, 1907 117
Seligman, Isaac N. Trust Problem.....National Conference on Trusts and Combinations, Proceedings, 1907 119
Ziebold, Charles F. Uniform Federal and State Control over Interstate Matters .....National Conference on Trusts and Combinations, Proceedings, 1907 120
Hough, C. M. Nation Should Superintend All Carriers.. .....Annals of the American Academy 123
Montgomery, Harry E. Federal Search-Light..... Moody's Magazine 129
Palmer, Henry W. Federal Incorporation....National Conference on Trusts and Combinations, Proceedings, 1907 132
Amidon, Charles F. Constitution and the Corporations.. ..... Outlook 141
Stimson, F. J. Opinion ....United States. Industrial Commission. Reports 153
Auerbach, Joseph S. President Roosevelt and "the Trusts" ..... North American 155
Gunton, George. Public and the Trusts..... .....Chicago Conference on Trusts, 1900 158

Bascom, John. Industrial Corporations..Moody's Magazine 159
Chaplin, H. W. National Incorporation.....
..... Columbia Law Review 163
Discussion of Federal Incorporation....Current Literature 164

Negative Discussion:

Parsons, John E. Federal Regulation of Corporations: Dangerous Departure..... Green Bag 167
Discussion of Federal Incorporation....Current Literature 170
Dos Passos, John R. Testimony.....
.....United States. Industrial Commission. Reports 172
Cochran, W. Bourke..Chicago Conference on Trusts, 1900 174
Rogers, A. E.....Chicago Conference on Trusts, 1900 177
Parsons, Frank. Remedies for Trust Abuses.....Arena 179
Potter, W. F. State Control of Corporations.....Outlook 182
Rogers, Henry W. Constitution and the New Federalism
..... North American 184
Adams, Alton D. Federal Control of Trusts.....
.....Political Science Quarterly 188
Russing, Eugene E. Corporate Reforms....National Conference on Trusts and Combinations, Proceedings, 1907 193
Slayden, James L. Railway Regulation in Texas.....
.....Annals of the American Academy 194
Whitney, Edward B. How Congress Can Deal with the Trusts ..... Independent 194

Supplementary Material for Second Edition

Batchelder, Charles C. Character and Powers of Governmental Regulation Machinery .....
.....Journal of Political Economy 201
Wickersham, George W. Enforcement of the Anti-Trust Law ..... Century 212
Roberts, Ernest W. Federal Incorporation of Interstate Corporations ..... Annals of the American Academy 224
Newlands, Francis G. Federal Trade Commission Bill....
..... Review of Reviews 230
Federal Trade Commission ..... Independent 238

BRIEF

Resolved, That all corporations engaging in interstate commerce should be required to take out a federal charter, granting such legislation would be constitutional.

Introduction

I. There has been a remarkable growth in the number and business of corporations.
   A. The early corporations were mostly local.
   B. Now the great majority engage in commerce in nearly every state of the Union.

II. As a result, it is demanded that corporations engaged in interstate commerce be chartered by the federal government.
   A. It is advocated by President Taft and other executive officers.
   B. Much has been written in favor of it.
   C. Many heads of corporations desire it.
   D. Financial interests favor it.

III. By federal incorporation is meant
   A. All corporations engaged in interstate commerce must obtain from the federal government charters defining their powers and organization.
   B. In so far as these corporations engage in business confined to the states, they will remain subject to state regulation.

Affirmative

The Affirmative is in favor of the proposed system of federal incorporation, for

I. There are serious evils in corporations which are national in scope.
   - A. Overcapitalization, resulting in
     1. Loss to investors.
     2. High prices to public.
   - B. Monopoly.
   - C. Dishonesty in promotion and management.

II. These evils are inherent in the present system of state incorporation and added federal regulation.
   - A. There is competition among the states for the incorporation tax, resulting in
     1. Lax incorporation laws in many states.
     2. States having loose codes charter most of our corporations, which are then given entry in the other states.
     3. Diverse and conflicting authority to which corporations are responsible.
   - B. Concerted action by the states cannot be expected.
   - C. Added federal regulation has failed to correct these evils.
     1. Federal and state authorities do not cooperate.

III. Federal incorporation is the only logical and effective remedy for these evils.
   - A. Only in this way can effective publicity be secured.
   - B. The rivalry of the states makes efficient state charters impossible.
   - C. As long as the present system prevails, interstate commerce will be dominated by state laws.
   - D. By a federal charter, regulation would be exercised by an authority whose jurisdiction is as broad as the field covered by the corporations.

IV. Federal incorporation would be a desirable extension of national activity.
   - A. Corporations would be responsible to one central authority in place of many conflicting authorities.

B. Corporation law and judicial procedure would be greatly simplified.
C. Discriminating legislation would be swept away.
   1. All corporations would have free entrance into all the states of the union.
   2. The inequalities of state legislation and taxation would be removed.
D. Friction between federal and state authority would be abolished.
E. It would make safe and steady the development of large business interests.

Negative

The Negative is not in favor of the proposed system of federal incorporation, for

I. It is not the natural or logical remedy for the evils of corporate industry.
   A. It is too radical.
      1. Our present body of corporation law and doctrine would be destroyed.
      2. The change from state to federal charter would injure business affairs.
      3. Stockholders would be at the mercy of Congress.
      4. The states would be robbed of the incorporation tax.
   B. It is over-centralizing.
      1. Politically.
      2. Industrially.
II. Federal Incorporation is unnecessary.
   A. Congress already has full power over interstate commerce.
   B. Corporate evils can be remedied by machinery already in existence.
      1. Present laws can be enforced.
      2. Publicity would be effective and can be secured.
      3. Congress can demand uniform corporation laws among the states.
      4. The taxing power can be utilized.

C. Federal incorporation would be worthless unless Congress passed wise laws.

III. Federal incorporation is undesirable for other reasons.
  A. It is impracticable.
    1. It would be physically impossible to transact the business.
    2. It could be easily evaded.
    3. It would derange state systems of taxation.
  B. It would be ineffective.
    1. Corporations chartered by the federal government would be still subject to state law and taxation.
  C. It would lead to corruption.
  D. The states are constantly developing better systems of control.

IV. If need be, the existing machinery can be strengthened by a federal license.
  A. By a federal license is meant
    1. The state shall continue to charter the corporation but the corporation must secure a federal license before engaging in interstate commerce.
      a. The balance of power between the state and nation is preserved.
      b. A uniform standard for state incorporation laws would be provided.
      c. The right of the state to tax is maintained.
    2. If the corporation abuses its privileges, the license may be revoked, or the corporation fined.
      a. The federal government thus maintains absolute and efficient control over interstate corporations.
      b. The sovereignty of the states is not impaired.
    3. This license would be compulsory only on corporations doing a certain annual amount or more of interstate business.
      a. It would not work injury to the small corporations whose business is mostly local.
      b. The federal government would not be swamped with the work of controlling all interstate corporations.

BIBLIOGRAPHY

An asterisk (*) preceding a reference indicates that the entire article or a part of it has been reprinted in this volume.

Bibliographies

Chicago University. Federal Incorporation: Constructive and Rebuttal Speeches of the Representatives of Chicago, Michigan and Northwestern Universities. pp. 73-6. Delta Sigma Rho, Chicago Chapter, 1911.

Iowa. State University. Constructive and Rebuttal Speeches of the Representatives of the State University of Iowa in the Inter-Collegiate Debates, 1912-1913 [Resolved: That All Corporations Engaged in Interstate Commerce Should Be Required to Take out Federal Charters, It Being Conceded that Such a Requirement Would Be Constitutional and that Federal License Shall not Be Available as an Alternative Plan]. pp. 33-6. The H. W. Wilson Co., Minneapolis. 1913.
Contains a brief also.

Nichols, Egbert Ray, ed. Intercollegiate Debates. Vol. 4. Hinds, Noble & Eldredge, New York. 1914.
See chapter on Federal Charter for Corporations Engaged in Interstate Commerce.

Pearson, Paul M. Intercollegiate Debates. pp. 55-64, 159-61. Hinds, Noble & Eldredge, New York. 1909.

Shurter, Edwin Du Bois and Taylor, Carl Cleveland. Both Sides of 100 Public Questions Briefly Debated. pp. 239-41. Hinds, Noble & Eldredge, New York. 1913.

United States. Library of Congress. List of References on Federal Control of Commerce and Corporations. pp. 50-6. Federal Incorporation. Federal Licensing. 1914. Supt. of Doc.

United States. Industrial Commission. Reports. Vol. XIII. pp. 947-77. Bibliography of Trusts and Industrial Combinations.

United States. Library of Congress. List of Books with References to Periodicals, Relating to Railroads in Their Relation to the Government and the Public. 1907. Supt. of Doc.

United States. Library of Congress. List of Books, with References to Periodicals, Relating to Trusts. Third Edition. 1907. Supt. of Doc.

United States. Library of Congress. List of More Recent Works on Federal Control of Commerce and Corporations. 1907. Supt. of Doc.

United States. Library of Congress. List of References on Federal Control of Commerce and Corporations. Second Issue with Additions. 1904. Supt. of Doc.

General Works

Beard, Charles A. American Government and Politics. pp. 379-86. The Macmillan Co., New York. 1910.

*Bliss, William D. P. New Encyclopedia of Social Reform. pp. 313-6, 1236-9. Funk & Wagnalls, New York. 1908.

*Chicago Conference on Trusts. Civic Federation of Chicago. 1900.

Chicago University. Federal Incorporation: Constructive and Rebuttal Speeches of the Representatives of Chicago, Michigan and Northwestern Universities. Delta Sigma Rho, Chicago Chapter. 1911.

Sold by The H. W. Wilson Company, White Plains, New York.

Congressional Record.

Consult the indexes to volumes 50 and 51 under H. R. 15613 for speeches and debate regarding the new Federal Trade Commission Bill.

Compendium of Transportation Theories. Kensington Pub. Co., Washington, D. C. 1893.

pp. 80-5. Federal Control of Railways. Shelby M. Cullom.
pp. 112-20. Amendment of the Interstate Commerce Law. Aldace F. Walker.
pp. 178-84. Interstate Commerce Law. Charles F. Adams, Jr.
pp. 242-50. Interstate Commerce Act—Pooling and Combinations Which Affect Its Operation. Thomas M. Cooley.

Congressional Record. 45: 394-6. Ja. 7, '10. Anti-Trust Law and Federal Incorporation. William H. Taft.

The President's special message to Congress, containing certain recommendations in regard to the Interstate Commerce and Anti-Trust Laws, and proposing federal incorporation. Also issued as House Doc. 484. 61st Cong. 2d Sess.

*Dill, James B. National Incorporation Laws for Trusts. Address, Before The Seminary in Economics of Harvard University, March 10, 1902.

Reprinted from the Yale Law Journal, April, 1902. Apply to the Registration and Trust Co., 41 Cedar St., New York.

Ely, Richard T. Monopolies and Trusts. The Macmillan Co., New York. 1906.

Fay, Charles Norman. Big Business and Government. Moffat, Yard & Co., New York. 1912.

Federal Trade Commission Bill. Comparative Print Showing H. R. 15613, an Act to Create an Interstate Trade Commission, to Define Its Powers and Duties, and for Other Purposes as Passed by the House, as Passed by the Senate and as Agreed to in Conference. Gov't. Ptg. Office. Wash., D. C. 1914.

*French, H. Findlay. Federal Control of Trusts and Combinations in Restraint of Trade under the Commerce Clause of the Constitution. 28p. Baltimore. 1909.

Garrett. Finis J. Federal Incorporation: Speech in the House of Representatives, February 7, 1910. 15p. pa. Gratis.

Reprinted from Congressional Record. 45: 1560-4. February 7, 1910. Apply to Hon. Finis J. Garrett, Dresden, Tenn.

Hadley, Arthur T. Economics. Chaps. III & VI. Putnam's, New York. 1896.

Hart, Albert B. Actual Government. pp. 48-59, 481-534. Longmans, Green & Co., New York. 1911.

Heisler, Roland Carlisle. Federal Incorporation: Constitutional Questions Involved. Boston Book Co., Boston. 1913.

Hendrick, Frank. Power to Regulate Corporations and Commerce. Chap. V. Putnam's, New York. 1906.

Iowa. State University. Constructive and Rebuttal Speeches of the Representatives of the State University of Iowa in the Inter-Collegiate Debates of 1912-1913 [Resolved: That All Corporations Engaged in Interstate Commerce Should Be Required to Take out Federal Charters, It Being Conceded that Such a Requirement Would Be Constitutional and that Federal License Shall not Be Available as an Alternative Plan]. The H. W. Wilson Co., Minneapolis. 1913.

Jenks, Jeremiah W. Trust Problem. Doubleday, Page & Co., New York. 1909.

*Johnson, Emory R. American Railway Transportation. Part IV. Railways and the State. 2d. rev. ed. Copyright, 1903, 1904, 1908, by D. Appleton & Co., New York.

Judson, Frederick N. Law of Interstate Commerce and Its Federal Regulation. pp. 80-6. T. H. Flood & Co., Chicago. 1905.

Kansas Bar Association. Proceedings. 1906: 33-51. Government and the Corporation. Charles W. Smith.

Knauth, Oswald Whitman. Policy of the United States towards Industrial Monopoly. [Columbia Univ. Studies in History, Economics and Public Law. Vol. 56. No. 2. 1914.]

National Association of Credit Men. Bulletin. 10: 569-85. Jl. '10; 11: 627-40. Jl. '11. Reports of Special Committee on Federal Incorporation Law.

Reprinted in American Legal News. 21: 494-500. August, 1910.

National Association of Manufacturers of the United States. Proceedings. 1905: 250-7; 1906: 34-9; 1908: 226-33. Reports of Committee on National Incorporation.

*National Conference on Trusts and Combinations, Proceedings. Chicago, 1907. National Civic Federation. New York.

Nichols, Egbert Ray., ed. Intercollegiate Debates. Vol. 4. Hinds, Noble & Eldredge, New York. 1914.

See chapter on Federal Charter for Corporations Engaged in Interstate Commerce.

North, S. N. D. American Year Book, 1910. Trusts and Combinations. pp. 36-9. D. Appleton & Co., New York.

Pearson, Paul M. Intercollegiate Debates. pp. 39-64, 147-61. Hinds, Noble & Eldredge, New York. 1909.

Reports, with bibliographies, of debates on Federal Charter for Interstate Commerce and Federal Control of Railroads.

Perkins, George W. Some Things to Think About. 14p. pa.

Delivered at the Graduate School of Business Administration, Harvard University, April 15, 1910. Address George W. Perkins, 23 Wall St., New York City.

Prentice, E. Parmalee. Federal Power over Carriers and Corporations. Chap. VI. The Macmillan Co., New York. 1907.

*Report of the Commissioner of Corporations. 1904. (58th Congress, 3d Session. House Doc. No. 165.)

Ripley, William Z. Railway Problems. pp. 531-56; 579-601. Ginn & Co., Boston. 1907.

Stimson, Frederick J. Popular Law-Making. pp. 173-204. Scribner's, New York. 1910.

United States. Bureau of Corporations. Report of the Commissioner of Corporations on the Beef Industry. 1905. Govt. Printing Office.
Read especially pp xix-xxxvi.

United States. Bureau of Corporations. Interstate Commerce Law as Changed by the Act of June 29, 1906. Govt. Printing Office.

United States. Bureau of Corporations. Report of the Commissioner of Corporations on the Petroleum Industry. Parts 1 and 2. Govt. Printing Office. 1907.
Read especially Part 1, pp. 1-38. Part 2. pp. 1-67.

United States. Bureau of Railway Economics. Conflict between Federal and State Regulation of the Railways. Bulletin. No. 15. 13p. pa. 1911. Washington, D. C.

United States. 59th Congress, 1st Session. Senate Doc. Nos. 243 and 244. Hearings before the Senate Committee on Inter-State Commerce on Regulation of Railway Rates, with Digest of Hearings.

*United States. Industrial Commission. Reports. Vol. I. Part 1. pp. 9-38. Part 2. pp. 1139-1219.

United States. Industrial Commission. Reports. Vol. II, XIII, and XVIII.

*United States. Industrial Commission. Reports. Vol. XIX. pp. 595-722.

Wickersham, George W. Changing Order. pp. 143-61. G. P. Putnam's Sons, New York. 1914.

Wilgus, Horace L. National Incorporation Law. 134p. Ann Arbor, Mich. 1904.
Reprinted from Michigan Law Review. 2: 358, 501. February and April, 1904.

Wilgus, Horace L. Study of the United States Steel Corporation in Its Industrial and Legal Aspects. pp. 68-95. Callaghan & Co., Chicago. 1901.

Magazine Articles

General References

American Economic Review. 3: sup. 114-25. Mr. '13. Frontier of Regulation and What Lies Beyond. John M. Clark.

American Economic Review. 3: sup. 126-31. Mr. '13. Economics of Governmental Price Regulation. Chester W. Wright.

American Economic Review. 3: sup. 132-42. Mr. '13. Economics of Governmental Price Regulation—Discussion.

American Economic Review. 3: sup. 3-17. Mr. '14. Renewed Extension of Government Control of Economic Life. David Kinley.

American Industries. 14: 15. Jl. '14. Business Inquisition. Walter D. Wile.

American Journal of Sociology. 1: 411-25. Ja. '96. Anti-Monopoly Legislation in the United States. J. D. Forrest.

American Journal of Sociology. 1: 657-73. My. '96. Recent Legislation in Restraint of Trade. Charles F. Beach, Jr.

American Journal of Sociology. 5: 228-45. S. '99. Control of Trusts. J. D. Forrest.

American Law Register. 53: 529-71; 593-604. S.-O. '05. Exclusiveness of the Power of Congress over Interstate and Foreign Commerce. James S. Rogers.

American Magazine. 67: 506-13. Mr. '09. Old Order Changeth. William A. White.

Annals of the American Academy. 42: 183-201. Jl. '12. Policies of Germany, England, Canada and the United States toward Combinations. Francis Walker.

Annals of the American Academy. 42: 277-83. Jl. '12. Administration's Theory of a Constructive Policy concerning Combinations. George W. Wickersham.

Annals of the American Academy. 42: 289-95. Jl. '12. Review and Criticism of Anti-Trust Legislation. Francis G. Newlands.

Annals of the American Academy. 53: 71-84. My. '14. Effect of State Regulation upon the Municipal Ownership Movement. Delos F. Wilcox.

Annals of the American Academy. 55: 17-47. S. '14. Extent of Regulation of Ocean and Inland Water Transportation by the Federal Government. Grover G. Huebner.

Annals of the American Academy. 5: 569-73. Ja. '95. Economic and Uneconomic Anti-Trust Legislation. Frederick H. Cooke.

Annals of the American Academy. 5: 573-7. Ja. '95. Trusts: Abuses and Remedies. Jerome Dowd.

Annals of the American Academy. 24: 17-26. Jl. '04. Government Control of Banks and Trust Companies. William Ridgeley.

*Annals of the American Academy. 24. 89-110. Jl. '04. Federal Power Over Trusts. James M. Beck.

Annals of the American Academy. 24: 113-22. Jl. '04. Scope and Limits of Congressional Legislation against the Trusts. Charlton T. Lewis.

Annals of the American Academy. 24: 125-47. Jl. '04. Northern Securities Case. James W. Garner.

A complete history of the case including (1) organization of the corporation; (2) purposes for which it was formed; (3) various legal prosecutions it underwent; (4) decision of the Supreme Court; and (5) the question of readjustment after the decision.

Annals of the American Academy. 26: 44-52. N. '05. Constitutional Difficulties of Trust Regulation. Warren Bigelow.

Annals of the American Academy. 26: 613-28. N. '05. National Regulation of Railroads. Martin A. Knapp.

Annals of the American Academy. 26: 642-54. N. '05. Federal Control of Interstate Commerce. Harry E. Montgomery.

Annals of the American Academy. 32: 3-29. Jl. '08. Government's Relation to Corporate Construction and Management. Peter S. Grosscup.

Lays down (1) the structural principles on which corporations should be reconstructed; (2) the fundamental object of such construction; (3) the scope and limits of government interference.

*Annals of the American Academy. 32: 120-4. Jl. '08. Trend of Governmental Regulation of Railroads. Emory R. Johnson.

Annals of the American Academy. 32: 212-7. Jl. '08. Development of the Federal Government. Theodore E. Burton.

Federal control must necessarily increase as a result of our national growth but the evolution is a natural one and not to be feared.

Arena. 22: 191-200. Ag. '99. State Control of Trusts. Rudolph Kleberg.

Atlantic Monthly. 79: 377-85. Mr. '97. Good and Evil of Industrial Combination. Arthur T. Hadley.

Atlantic Monthly. 81: 433-43. Ap. '98. Decade of Federal Railway Regulation. Henry C. Adams.

History of the first ten years of the Interstate Commerce Commission.

Bankers Magazine. 88: 483-4. Ap. '14. Mad Rush to Throttle Enterprise or Success.

Chicago Daily Tribune. pp. 1-4. May 16, 1911. Standard Oil Illegal Trust; Must Dissolve.

A complete review of the case with text of the decision of the Supreme Court.

Columbia Law Review. 5: 77-106. F. '05. Chief Justice Marshall on Federal Regulation of Interstate Carriers. E. Parmalee Prentice.

Contemporary Review. 57: 829-45. Je. '90. Trusts in the United States. Robert Donald.

Cosmopolitan. 30: 430-3. F. '01. Public Control of Private Corporations. Richard T. Ely.

*Craftsman. 19: 72-7. O. '10. How the Real Interests of the Railroads Are Served by Restrictive Legislation. Gustav Stickley.

Current Literature. 29: 567-9. N. '00. Remedy for Trusts.

*Current Literature. 48: 253-6. Mr. '10. Discussion of Federal Incorporation.

*Current Literature. 50: 362-5. Ap. '11. Railway Regulation a Fact at Last.

Economic Journal. 10: 151-71. Je. '00. Federal Regulation of Railways in the United States. Simon J. McLean.

Economic Journal. 10: 349-69. S. '00. State Regulation of Railways in the United States. Simon J. McLean.

Engineering Magazine. 40: 841-53. Mr. '11. State Power and Its Relation to Industrial Policy in Germany. Franz E. Junge-Hermsdorf.

Engineering Magazine. 45: 330-3. Je. '13. Growth of Modern Industrialism. Edwin C. Eckel.

Engineering Magazine. 47: 35-7. Ap. '14. Legal and Economic Position of Great Corporations. Edwin C. Eckel.

Forum. 8: 61-72. S. '89. Facts about Trusts. Charles F. Beach, Jr.

Forum. 11: 524-40. Jl. '91. Operation of the Interstate Commerce Law. Aldace F. Walker.

Forum. 26: 452-8. D. '98. Recent Construction of the Federal Anti-Trust Act. David Wilcox.

Forum. 27: 257-67. My. '99. Anti-Trust Legislation. Aldace F. Walker.

Gunton's Magazine. 13: 251-8. O. '97. Truth about the Trusts. Roswell P. Flower.

Gunton's Magazine. 15: 125-33. Ag. '98. Railroads and the Government. B. W. Arnold, Jr.

Gunton's Magazine. 19: 209-15. S. '00. Latest Phase of the Trust Problem. John B. Clark.

Harper's Monthly. 75: 71-9. Je. '87. Growth of Corporations. Richard T. Ely.

Harper's Monthly. 85: 240-50. Jl. '92. Growth of Federal Power. Henry L. Nelson.

Harper's Weekly. 54: 28. F. 5, '10. Wall Street and Washington. Franklin Escher.

A discussion mostly favorable of the legislation proposed by President Taft in his special message to Congress of Mr. 7, 1910.

Harvard Law Review. 7: 157-69. O. 25, '93. Present Legal Status of Trusts. S. C. T. Dodd.

Good as a review of the legislation concerning trusts in England and the United States.

Harvard Law Review. 7: 338-55. Ja. '94. Monopoly under the National Anti-Trust Act. William F. Dana.

Harvard Law Review. 9: 324-45. D. 26, '95. Federal Restraints upon State Regulation of Railroad Rates of Fare and Freight. William F. Dana.

Harvard Law Review. 13: 198-212; 264-78. N.-D. '99. New Jersey and the Great Corporations. Edward Q. Keasbey.

Harvard Law Review. 26: 667-83. Je. '13. Power of Congress to Enact Incorporation Laws and to Regulate Corporations. Victor Morawetz.

Independent. 51: 2634-6. S. 28, '99. Remedies for Trusts.

Independent. 54: 2927-30. D. 11, '02. How Congress May Control Trusts. E. W. Huffcut.

Independent. 63: 840-2. O. 10, '07. Control of Corporations—Wrong Doers of Great Wealth.

Independent. 68: 158-9. Ja. 20, '10. Federal Incorporation.

A discussion of President Taft's proposed bill for federal incorporation.

Independent. 68: 378-9. F. 17, '10. Federal Incorporation.

A discussion of President Taft's proposed bill for federal incorporation.

*Independent. 80: 116-7. O. 26, '14. Federal Trade Commission.

International Review. 10: 428-36. My. '81. Taxation of Inter-State Commerce. Brooks Adams.

Iron Age. 94: 381-3. Ag. 13, '14. Text of Bill Known as H. R. 15613 as Passed by the Senate August 5.

*Journal of Political Economy. 18: 221-2. Mr. '10. Incorporation under Federal Law.

Journal of Political Economy. 20: 406-15. Ap. '12. Interstate Trade Commission. William D. Foulke.

Journal of Political Economy. 20: 473-9. My. '12. Constitutional Aspects of Federal Regulation of Business. James P. Hall.

Literary Digest. 48: 367-8. F. 21, '14. Owen Stock-Exchange Bill.

Nation. 70: 431-2. Je. 7, '00. Trusts and Interstate Trade.

Nation. 92: 520-1. My. 25, '11. Law and the Trusts.

Nation. 98: 319-20. Mr. 26, '14. Justice to Public Service Corporations.

North American. 149: 44-53. Jl. '89. Telegraph Monopoly. Richard T. Ely.

North American. 169: 210-7. Ag. '99. Anti-Trust Legislation. Joseph D. Sayers.

North American. 169: 375-98. S. '99. Legal Aspects of Trusts. Joseph S. Auerbach.

North American. 178: 499-511. Ap. '04. State Monopolies of Interstate Commerce. E. Parmalee Prentice.

North American. 179: 420-32. S. '04. Four Years of Anti-Trust Activity. James W. Garner.

*North American. 182: 123-32. Ja. '06. Plan for Regulating the Trusts. John F. Cronan.

North American. 183: 189-94. Ag. '06. Sherman Anti-Trust Law. Charles G. Davis.

North American. 184: 120-34. Ja. 18, '07. Ethics of Corporate Management. Arthur T. Hadley.

North American. 187: 388-98. Mr. '08. Corporations in Modern Business. George W. Perkins.

North American. 187: 684-701. My. '08. States and the Federal Government. Woodrow Wilson.

North American. 191: 311-21. Mr. '10. Prosperity with Justice —Working toward a Solution. Peter S. Grosscup.

North American. 193: 694-707. My. '11. Railroad Rate Decision. J. S. Shirley Eaton.

North American. 193: 708-20. My. '11. Politics of American Business. Sydney Brooks.

North American. 199: 205-18. F. '14. Regulation by Commission. Samuel O. Dunn.

North American. 199: 535-9. Ap. '14. Completing the Anti-Trust Programme. S. Untermyer.

Outlook. 82: 883-7. Ap. 21, '06. Man with the Muck-Rake. Theodore Roosevelt.

Outlook. 88: 467*-8*. F. 29, '08. What Has the Interstate Commerce Commission Accomplished?

Outlook. 94: 98-9. Ja. 15, '10. Federal Charters for Interstate Corporations.

A discussion of President Taft's recommendation for federal incorporation of corporations carrying on interstate commerce.

Outlook. 94: 560-3. Mr. 12, '10. Railway Regulation.

*Outlook. 95: 451-2. Jl. 2, '10. Important Congressional Action: Railway Law.

Outlook. 98: 141-3. My. 27, '11. Standard Oil Decision: An Interpretation.

Outlook. 98: 281-3. Je. 10, '11. Prevention of Monopoly.

Outlook. 101: 262-8. Je. 1, '12. Not Disorganization but Regulation. Lyman Abbott.

Outlook. 106: 233-5. Ja. 31, '14. President Wilson and the Trade Commission.

Political Science Quarterly. 3: 592-632. D. '88. Legality of Trusts. Theodore W. Dwight.

Political Science Quarterly. 9: 486-509. S. '94. Capitalistic Monopolies and Their Relation to the State. Jeremiah W. Jenks.

Political Science Quarterly. 12: 273-94. Je. '97. Nature of Corporations. John P. Davis.

Political Science Quarterly. 12: 622-65. D. '97. Comments on Federal Trust Legislation. Carman F. Randolph.

Political Science Quarterly. 25: 1-19. Mr. '10. Attitude of Private Conscience toward Corporate Right. Joseph B. Ross.

Political Science Quarterly. 28: 586-92. D. '13. Governmental Regulation of Securities Issues. Arthur U. Ayres.

Popular Science Monthly. 34: 619-30. Mr. '89. Competition and Trusts. George Iles.

Popular Science Monthly. 44: 740-3. Ap. '94. Trusts Their Own Corrective. George A. Rich.

Popular Science Monthly. 45: 289-313. Jl. '94. Meaning of Corporations and Trusts. Logan G. McPherson.

Public Opinion. 27: 387-8. S. 28, '99. St. Louis Anti-Trust Conference.

Public Opinion. 27: 388-9. S. 28, '99. Bryan's Trust Remedy.

Public Opinion. 37: 807-8. D. 29, '04. Administration's Trust Plan.

Quarterly Journal of Economics. 1: 28-44. O. '86. Private Monopolies and Public Rights. Arthur T. Hadley.
A history of railway regulation up to the time of the Interstate Commerce Act.

Quarterly Journal of Economics. 3: 117-52. Ja. '89. Trusts According to Official Investigations. E. Benjamin Andrews.

Quarterly Journal of Economics. 12: 461-6. Jl. '98. Recent Legislation and Adjudication on Trusts. Jeremiah W. Jenks.

Quarterly Journal of Economics. 21: 22-51. N. '06. Interstate Commerce Act as Amended. Frank H. Dixon.
A full discussion of the provisions of the Hepburn Law of 1906.

Quarterly Journal of Economics. 24: 593-633. Ag. '10. Mann-Elkins Act, Amending the Act to Regulate Commerce. Frank H. Dixon.
An analysis of the new law.

Quarterly Journal of Economics. 28: 664-700. Ag. '14. Ultimate Results of Permitting and Regulating Combinations. E. Dana Durand.

*Quarterly Review. 207: 28-57. Jl. '07. President Roosevelt and the Trusts. Simon J. McLean.

Railway Age. 57: 209-12. Jl. 31, '14. Will Government Regulation Succeed? Samuel O. Dunn.

Railway Review. 54: 712-5. My. 9, '14. Plea for Co-operation in the Proposed Regulation of Business. Arthur Wyman.
Same condensed. American Industries. 14:13-4+. July, 1914.

Railway Review. 55: 283-4. S. 5, '14. Covington Trade Commission Bill Agreed upon in Conference.

Review of Reviews. 34: 687-8. D. '06. President Roosevelt and Corporate Wealth. Arthur W. Dunn.

Review of Reviews. 43: 602-4. My. '11. Federal Regulation of American Railroads. Charles H. Marshall.

A short history of rate making and cutting before and after the Interstate Commerce Law.

*Review of Reviews. 50: 477-80. O. '14. Federal Trade Commission Bill. Francis G. Newlands.

Science, n. s. 37: 579-93. Ap. 18, '13. Function of Research in the Regulation of Natural Monopolies. Edward B. Rosa.

Scribner's Magazine. 26: 604-10. N. '99. Formation and Control of Trusts. Arthur T. Hadley.

*World's Work. 4: 2526-32. S. '02. Home of Trusts. S. McReynolds.

World's Work. 11: 7255-6. Mr. '06. Texan Regulation of Corporations.

An example of efficient state regulation.

World's Work. 16: 10409-10. Jl. '08. Roosevelt on State Rights.

World's Work. 19: 12730-8. Mr. '10. How to Regulate Corporations. James J. Hill.

World's Work. 22: 14465-71. Je. '11. Business: the Moral Question. George W. Perkins.

Proposes a business court which should have final adjustment of great business problems..

World's Work. 28: 370-2. Ag. '14. Interstate Trade Commission.

Yale Law Journal. 20: 177-90. Ja. '11. Federal Incorporation and Control. Frank B. Kellogg.

Yale Review. 7: 72-94. My. '98. Concentration of Industry in the United States. William F. Willoughby.

*Yale Review. 18: 390-412; 19: 13-31. F.-My. '10. Holding Corporation. Maurice H. Robinson.

Affirmative References

Albany Law Journal. 69: 363-8. D. '07. Considerations for a Sixteenth Amendment. Edward L. Andrews.

American Law Review. 37: 237-54. Mr.-Ap. '03. National Incorporation and Control of Corporations. Walter S. Logan.

Reprinted from N. Y. State Bar Assn. Proceedings. 1903. p. 297-318.

American Law Review. 37: 703-12. S.-O. '03. Federal Control of Corporations. John B. Sanborn.

*Annals of the American Academy. 32: 218-24. Jl. '08. Nation Should Superintend All Carriers. C. M. Hough.

Annals of the American Academy. 32: 235-9. Jl. '08. Corporation Regulation by State and Nation. Henry M. Hoyt.

A strict distinction should be observed between national and state control, but federal control should be extended to cover interstate commerce as far as possible.

*Annals of the American Academy. 42: 303-9. Jl. '12. Federal Incorporation of Interstate Corporations. Ernest W. Roberts.

Arena. 19: 289-99. Mr. '98. Trusts: Their Causes and the Remedy. Marion Butler.

Arena. 40: 273-82. O. '08. "Square Deal" for the Railroads. Carl S. Vrooman.

Atlantic Monthly. 103: 114-22. Ja. '09. American Democracy and Corporate Reform. Robert R. Reed.

Bankers Magazine. (N. Y.) 68: 327-30. Mr. '04. Federal Control of Corporations Engaged in Interstate Business. Allan L. McDermott.

*Century. 83: 616-22. F. '12. Enforcement of the Anti-Trust Law. George W. Wickersham.

*Columbia Law Review. 5: 415-35. Je. '05. National Incorporation. H. W. Chaplin.

Green Bag. 17: 138-41. Mr. '05. Federal Regulation of Corporations: Public Necessity. William J. Curtis.

Green Bag. 24: 37-8. Ja. '12. Federal Incorporation.

*Journal of Political Economy. 20: 373-405. Ap. '12. Character and Powers of Governmental Regulation Machinery. Charles C. Batchelder.

Michigan Law Review. 3: 264-81. F. '05. Federal License or National Incorporation. Horace L. Wilgus.

*Moody's Magazine. 1: 163-7. Ja. '06. Federal Search-Light. Harry E. Montgomery.

*Moody's Magazine. 1: 401-7. Mr. '06. Industrial Corporations. John Bascom.

*North American. 175: 877-94. D. '02. President Roosevelt and "the Trusts." Joseph S. Auerbach.

Outlook. 72: 880-4. D. 13, '02. How Congress May Control Trusts. Jeremiah W. Jenks.

Outlook. 81: 1046-7. D. 30, '05. Federal Control of Corporations.

Outlook. 86: 85-6. My. 18, '07. Judge Farrar's Plan.
*Outlook. 87: 19-26. S. 7, '07. Constitution and the Corporations. Charles F. Amidon.
Political Science Quarterly. 26: 63-97. Mr. '11. Federal Incorporation. Sydney D. M. Hudson.
World To-Day. 21: 1428-1428d. D. '11. Initial Steps in Trust Control. William R. Hearst.
*Yale Law Journal. 11: 273-95. Ap. '02. National Incorporation Laws for Trusts. James B. Dill.

Negative References

Albany Law Journal. 69: 266-71. S. '07. President's Proposal for a Federal Railroad System. Edward L. Andrews.
Annals of the American Academy. 32. 185-211. Jl. '08. Federal Usurpations. John S. Williams.
*Annals of the American Academy. 32: 225-34. Jl. '08. Railway Regulation in Texas. James L. Slayden.
Annals of the American Academy. 42: 238-45. Jl. '12. Government Regulation of Big Business in the Future. Henry R. Seager.
Annals of the American Academy. 42: 310-30. Jl. '12. Control of Corporations, Persons and Firms Engaged in Interstate Commerce. John S. Williams.
*Arena. 24: 569-72. D. '00. Remedies for Trust Abuses. Frank Parsons.
Arena. 39: 217-21. F. '08. Popular Reaction against Extreme Centralization.
*Green Bag. 17: 135-7. Mr. '05. Federal Regulation of Corporations: Dangerous Departure. John E. Parsons.
Harvard Law Review. 19: 168-99. Ja. '06. Congress and the Regulation of Corporations. E. Parmalee Prentice.
Illinois Law Review. 5: 414-22. F. '11. National Incorporation. Dorrance Dibell Snapp.
Independent. 58: 47-8. Ja. 5, '05. Remedies for Corporation Evils.
*Independent. 58: 303-6. F. 9, '05. How Congress Can Deal with the Trusts. Edward B. Whitney.
Nation. 70: 392. My. 24, '00. Proposed Constitutional Amendment.

*North American. 188: 321-35. S. '08. Constitution and the New Federalism. Henry W. Rogers.

*Outlook. 82: 96. Ja. 13, '06. State Control of Corporations. W. F. Potter.

Outlook. 100: 596-602. Mr. 16, '12. Railway Man on the Business Situation. Francis E. Leupp.

*Political Science Quarterly. 18: 1-16. Mr. '03. Federal Control of Trusts. Alton D. Adams.

SELECTED ARTICLES ON FEDERAL CONTROL OF INTERSTATE CORPORATIONS

INTRODUCTION

The question of adequate regulation of the large corporations engaged in interstate commerce is a broad and difficult one, both because of the nature and variety of the problems involved, and the many, and often conflicting, remedies that are proposed for the evils of the existing system of control. At the present time, one thing seems definitely settled: That the government shall control interstate commerce and its agencies. The time has passed when the claim of railroad presidents and the managers of large industrial corporations, to the right of secrecy and non-interference in their business affairs, received serious consideration. The demand is now almost unanimous for efficient publicity and the regulation by law of all large industrial enterprises having the corporate form, whether railroad, trust, holding company, or combination. The question is what form this regulation shall take.

By the Constitution (Article 1, Section 8, Sub-Section 3), Congress has power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes." For many years this power was not exercised, except to a very limited extent, and, with few exceptions, the great railroad and industrial corporations were chartered by the states. In place of providing some system of control both Congress and the

various states vied with each other in making concessions to the railroads in the shape of grants of land, remission of duties, etc. As a result, serious abuses soon abounded, and thorough regulation was demanded both of the states and the national government. This regulation is now supplied by the state railroad commissions and general incorporation laws, and also by the national Interstate Commerce and Sherman Anti-Trust Laws. Although these laws have been amended from time to time, the general sentiment is that this dual system of control is unsatisfactory.

Among the various remedies that have been proposed for the existing state of affairs, three general theories of control can be distinguished.

1. The present system of dual control shall be retained, thereby maintaining the balance of power between the states and the national government. This can be accomplished, it is claimed, by enforcing existing laws, providing for effective publicity, and by insisting on uniform incorporation laws for all the states.

2. Congress shall delegate its power to control interstate commerce to the states. This plan would end the friction between the states and the national government, but receives little consideration because it is unconstitutional, and would augment rather than decrease the present evils of state control.

3. Congress shall take the entire control of interstate commerce and its agents into its own hands. This plan is seriously opposed by those who fear greater centralization of power in the hands of the federal government, but it has been strongly advocated by many in the last few years, and definite plans for such control have been submitted by Commissioner Garfield of the Bureau of Corporations, and by President Taft.

Among those advocating the third method of control, there is again great difference of opinion as to the form such control should take. The three plans most often suggested are:

1. The federal government itself should grant the charter of incorporation.

2. Charters may be granted by the states, but before engaging in interstate commerce, the corporation must secure a license from the federal government.

3. Congress shall control interstate corporations by its taxing power.

The second and third plans are, properly speaking, merely developments of the present system of control, and while more easily accomplished, would not, it is generally admitted, be as effectual as federal incorporation. There is some doubt that federal incorporation can be accomplished without an amendment to the Constitution, and it would be radical, even revolutionary, but it would be the most sure remedy for the evils of the present system.

The question selected for debate in this volume is that of federal incorporation versus the present system of dual control supplemented, if need be, by a federal license. The question has been chosen in this form partly because of the legislation proposed in Congress by President Taft, and partly because public discussion and academic debates have been largely concerned with the merits and demerits of this plan. While the question of constitutionality is discussed briefly in the General Discussion, it is omitted from the brief and the arguments, as debaters usually prefer to discuss such questions on their expediency alone.

The following discussion is presented in three sections, the General, Affirmative and Negative Discussions. The Affirmative and Negative Discussions contain the arguments for and against federal incorporation, covering the points outlined in the brief as nearly as possible in the order in which they are given.

Before debating any subject it is necessary that the debater have a broad and intelligent view of the history of the question and its relation to other important movements. For this purpose the General Discussion has been arranged to include articles covering the growth of corporations, the development of legislation in regard to them, both state and national, the issues involved, and the present status of the question. This makes a broad field to be covered, and the articles have been chosen to cover the various points named as clearly and succinctly as possible in the space that could be alloted to them. It is hoped that the student or debater will read this discussion before entering on the affirmative and negative arguments,

and further reading, from the articles listed in the bibliography, is also recommended. The following general outline was used in compiling the General Discussion, and it is included here in the hope that it may serve as a guide in the further reading of the student.

I. History of Corporations.
   A. Definitions.
   B. Growth and Development.
   C. Problems, Advantages and Disadvantages.

II. History of Legislation.
   A. Control by the States.
      1. Railroads.
      2. Corporations, other than Railroads.
   B. Growth of Federal Legislation.
      1. Power of Congress over Interstate Commerce.
      2. Interstate Commerce Act. 1887.
      3. Sherman Anti-Trust Law. 1890.
      4. Elkins Act (Bureau of Corporations). 1903.
      5. Hepburn Law. 1906.
      6. Mann-Elkins Act (Court of Commerce). 1910.
      7. Supreme Court Decisions in Dissolving Standard Oil and American Tobacco Companies. 1913.
      8. Federal Trade Commission and Clayton Anti-Trust Bills. 1914.

III. Present Status of the Question.
   A. Problems of Control.
   B. Federal Incorporation versus Federal License.
      1. Comparison.
      2. Constitutionality.

GENERAL DISCUSSION

New Encyclopedia of Social Reform. pp. 313-6.

William D. P. Bliss, ed.

CORPORATIONS: A corporation may be defined, in general, as a body formed and authorized by law to act as a single individual in carrying out the purposes for which it is incorporated. It is the creature of the state, and can do only that which it is allowed to do by the state in the act which gives it birth, but within those limits it can act as freely as any individual. Corporations are usually divided into public and private corporations.

> Over the former the legislature, as the trustee or guardian of the public interests, has the exclusive and unrestrained control; and acting as such, as it may create, so it may modify or destroy, as public exigency requires or recommends. . . . Private corporations on the other hand, are created by an act of the legislature, which, in connection with its acceptance, is regarded as a compact, and one which, so long as the body corporate faithfully observes, the legislature is constitutionally restrained from impairing, by annexing new terms and conditions, onerous in their operation, or inconsistent with a reasonable construction of the compact. (Angell and Ames on Corporations, p. 31, Chap. 1.)

Corporations are of comparatively recent growth. Says Professor Ely, in his articles on "The Growth of Corporations" in Harper's Magazine for 1887:

> In thirty years, in the second half of the eighteenth century, only one corporation was formed in Massachusetts, and that was of an eleemosynary character. When Alexander Hamilton wrote his celebrated report on the establishment of the first United States bank in 1790, there existed only three banking corporations in the United States. Some estimate that railway corporations own one fourth of the wealth of the country, but they did not begin to exist until more than half a century had elapsed after the promulgation of the Declaration of Independence. Gas companies, which have been so fruitful a source of corruption in states and municipalities, did not exist at all in the eighteenth century, and not in large numbers much before 1830. Manufactures were carried on in the last century in insignificant shops by men of little wealth and of no great social importance.

It was the general opinion a hundred years ago that corporations or joint-stock companies could not succeed, because they did not appeal to the stimulus of self-interest as much as private concerns, and therefore must go down in competition with them. The opinion of Adam Smith, in his "Wealth of Nations," (1776), is well known when he says:

> The trade of a joint-stock company is always managed by a court of directors. This court, indeed, is frequently subject in many respects to the control of a general court of proprietors. But the greater part of those proprietors seldom pretend to understand anything of the business of the company. . . . The directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honor. . . . Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs in such a company. . . . That a joint-stock company should be able to carry on successfully any branch of foreign trade when private adventurers can come into any sort of open and fair competition with them, seems contrary to all experience. . . . The only trades which it seems possible for a joint-stock company to carry on successfully, without an exclusive privilege, are those of which all the operations are capable of being reduced to what is called a routine, or to such uniformity of method as admits of little or no variation.

Nevertheless corporations, altho only comparatively recently of large growth, have existed at least some four hundred years.

Today, however, the corporate field, particularly in the United States, covers enterprises of every conceivable nature. Manufacturing corporations embracing every thinkable need or luxury of the human being, distributing concerns selling every kind and class of necessity and luxury in the lines of food, clothing, or what not, are carried on in the corporate form. Transportation methods of every kind, from the stage coach to the powerful locomotive and electric engine, from the coal-cart to the automobile, are operated by corporations. Our department stores, our restaurants, our candy manufacturers, our theaters, our magazines and newspapers, the advertising in the streetcars, many of the metropolitan barber shops, the bootblack stands and the news stands and book stores, are operated by corporations. Not a large building is now put up in American cities but that an enormous corporation puts in the foundation; an-

other corporation erects the superstructure, while usually a large realty or investing corporation owns and operates the building itself. The hats we wear, the umbrellas we carry, the clothes, all are shaped and produced to a large extent through corporative activity.

Not only is the corporate field diversified in the different classes of business and commercial undertakings, but it is also of gigantic scope and size. The estimated national wealth of the United States, at the present time is in excess of $110,000,000,000, and it is estimated that of this total wealth, something like one half is owned in corporate form. If we eliminate agricultural wealth and confine our estimate to only the wealth represented in manufacturing, transportation, and like industries, we find that over eighty per cent of such wealth is in corporate form. The tendency at the present time is for the corporate growth to increase several times more rapidly than the growth of private concerns. This is due to the fact that not only do most new undertakings start under the corporate form, but the tendency of former private concerns to combine as they grow and enter the corporate form seems absolutely irresistible.

The following figures from Moody's Manual for 1907 not only demonstrate the great magnitude of the corporate field, but illustrate the pronounced tendency of the smaller concerns to combine with or become swallowed in the larger ones. For the year ended May 1, 1907, the Manual reports facts and figures on about 222,000 miles of steam railroad in the United States, representing a combined par value capitalization in stocks and bonds, all of which is in the hands of the public, of about $13,900,000,000. These totals embrace 1419 active, existent corporations, all of which have stocks and bonds outstanding in one form or another. Of this number of corporations, however, no less than 688, representing 196,429 miles of railroad and having outstanding $12,931,000,000 of stocks and bonds, are controlled by fifty-seven large corporations; and the remaining 674 companies, which are independent of control, represent only 25,588 miles and about $977,000,000 of capitalization. It will thus be seen that nearly 90 per cent of the railroad mileage of the country and more than 92 per cent of the par value

capitalization of the railroad corporations of the country are embraced in the control of fifty-seven larger corporations or controlling systems.

The facts and figures bearing on other corporate undertakings in the United States are also interesting, both as regards magnitude and tendency, and all serve to demonstrate the fact that businesses of every nature are year by year going into the larger corporate form. The figures given in the Manual for 1907, covering the street-railway industry, the gas and electric light industry, the telephone, telegraph, and other public utility undertakings, as well as the field of manufacturing and miscellaneous enterprise, show that over $20,000,000,000 of capitalization is to-day in corporations, the stocks and bonds of which in each individual case aggregate at least $500,000, and are more or less in the hands of investors and the public generally. Thus it will be seen that including the steam-railroad industry, represented by a capitalization of about $14,000,000,000, the aggregate amount of capital in corporate form in this country is approximately $34,000,000,000, without considering the many thousand smaller corporations of less than $500,000 capital and also the banking and trust companies and other financial institutions of like nature.

Contrary to a very general impression, the owners of corporate wealth in this country are not alone à few millionaires, but a multitude of small investors whose average holdings are probably less than $10,000 each. Many of these are $5,000 investors and still more of them hold less than $1,000 each. In 1905 the Interstate Commerce Commission reported that the railroads of the country then had 327,850 shareholders. As this estimate is necessarily inaccurate and incomplete because of the fact that thousands of stockholders do not have the certificates in their names, the truth probably is that there are at least double this number of holders. It is a well-known fact that the Pennsylvania Railroad system alone has had on its books as high as 40,000 stockholders. The number of holders of railroad bonds is entirely unknown, but should at least equal that of stockholders, thus giving us as a fair estimate in the neighborhood of 1,500,000 of investors in the steam-railroad in-

dustry alone. If we add to this 1,500,000 more to represent the number of investors in other corporate undertakings which are not private or close, we have in all about 3,000,000 investors who are the owners of the corporate wealth of the United States. Of course, a proportion of these investors are outside of the United States, although what percentage is difficult to guess. If, however, we include all enterprises in which foreign capital would naturally enter, including mining undertakings, it would probably be fair to estimate 15 per cent of the above total as foreign, leaving approximately 2,550,000 persons to represent the ownership of the large corporate wealth of the country.

It should be pointed out that the above figures do not embrace the ordinary "close" corporations. The close corporation is different from the others in the fact that its entire stock is usually owned by a few individuals who are the actual managers of the enterprise itself. Thus it is, in effect, precisely similar to the old-style partnership as far as its responsibility to outsiders is concerned, and its success or failure in a financial sense therefore involves only those who are actively connected with it.

Concurrently with the rise of the modern corporation have come in various economic and social problems which would otherwise never have arisen. Under the old form of partnership the business man or firm usually found it necessary to either limit the amount of the business he might do to his personal financial capacity, or else make use of additional capital through the aid of a money-lender. Under the corporate form, however, securities are issued which produce the necessary capital to extend business and handle increased business, as well as to improve credit generally. These securities are of two classes, stocks and bonds. The stockholder stands in the same relation to the concern itself as did the old-fashioned partner, with the exception that the stockholder is not necessarily an active partner, and is not responsible for the debts of the concern beyond the amount of his shares. The bondholder, on the other hand, stands in the same position as the old-fashioned money-lender; that is, he is a creditor and his loan is usually secured by some sort of mortgage on the property. The difference between a stock and a bond, therefore, is simply the difference between the owner and the loaner.

While the modern form of corporate enterprise has slowly evolved, and is an enlargement of the old partnership method, yet it has in modern times taken on features which were entirely unknown to the partnership. For instance, in the matter of capitalization, the stock company of today is usually capitalized far beyond the invested value of the undertaking itself. For instance, if a former partnership represents an actual invested cash capital of $1,000,000, and is showing a net profit to its owners of $400,000 per annum (which is not an unusual occurence), when it is converted into a corporation its capitalization will be based not on the original investment, but on the earning power in connection with the current rate of interest, future prospects, etc. In this particular case, for instance, the capitalization of a corporation taking over such a business would not be less than $4,000,000, basing our estimate on the showing of earnings alone. Should there be other considerations, such as patent rights, franchises, or special conditions which would insure a steady future growth, the capitalization would be very much more than this; possibly twice as much. This bond issue alone which might be put on to such a property might run as high as $3,000,000 or $4,000,000. Thus has come in the custom of what is popularly known as "stock-watering." The difference between the actual invested amount of cash in the plant and the capitalization itself is generally understood to be the "water."

Another condition which had been brought about by the change of industrial and commercial activity through the corporate form is the concentration of control of industry, commerce, finance, etc., without the same concentration of responsibility. That is to say, while it is necessary for the corporate manager in order to be successful to bear great responsibility, yet he is usually now more in the position of an employee than an owner. Under the partnership form, the manager felt a financial responsibility and liability which he now seldom feels. He is usually employed under a large salary and while the failure of the organization may involve him financially, yet not to the same extent as it will the great body of stockholders or bondholders, who must supply the necessary capital, and who unlike the salaried manager, get nothing in the shape of income until it

is actually earned and can be drawn out of the business. It is, therefore, often the case that the corporation will be so managed as to benefit the officers and directors at the expense of the stockholders.

The foregoing situation is illustrated in many ways in modern corporate enterprise where conducted on a large scale. With corporate capitalizations running up into the billions of dollars and controlling entire industries, it is necessary to keep the control in close touch with large financial and banking interests. Thus the gigantic railroad, industrial, and public utility corporations of the United States are all managed from what is commonly known as "the Wall Street end." That is, the control of the companies, as represented in the boards of directors and officers, is all in the hands of the banking interests of the country, who supply the necessary capital, combine the plants, form underwriting syndicates, float the securities, devise the plans of capitalization and stand at the forefront of the financial organizations. The board of directors are usually chosen by the banking interests, and of course all matters of policy are either devised or approved by these same banking interests. Naturally the banking interests advocate policies which will serve to strengthen their control of the particular industries and conserve whatever special privileges the enterprises may have. The methods employed, while often of the best kind possible, do not universally result in the advantage of or even equitable treatment of the consumer.

A further result of large corporate enterprise is the necessity for the large privileged corporation to interfere with legislation. On the one hand, we find a public sentiment very antagonistic to corporations generally, and on the other hand we find the corporations endeavoring, in one way or another, to influence and guide legislation. There is a reason for corporate interference with legislation which is a perfectly rational one. Inasmuch as practically all antagonistic legislation, which is favored by the public, is of the nature of attack on results and not on causes, and often, if carried through, has the vicious effect of doing harm in greater amount to the community itself than to the corporation, it is perfectly natural that the corporate managers of the country should regard the legislation as stupid, inane and futile, and

should use all means in their power to retard it. This condition of things will logically continue until people awaken to the fact that in attacking corporate forms and not special privileges, they are barking up the wrong tree.

Yale Review. 18: 390-412; 19: 13-31. February, May, 1910.

Holding Corporation. Maurice H. Robinson.

The immediate and necessary effect of the extension and the consolidation of the railroads was to give to manufacturers who could offer a larger tonnage an advantage over their smaller and less advantageously situated neighbors. Where these conditions were allowed to work out the results, the smaller plants were abandoned after a struggle more or less protracted, and the larger ones increased their capacity to fill the demands of the market. Thus the process was not only destructive to the weaker plants, but costly to the larger ones; for the former did not abandon the field without a struggle, during which low prices and unusual expenses made it impossible in many cases to realize the cost of production, much less the ordinary rate of profits.

What then was the remedy for such conditions? During the last half century the answer has been worked out, partially at least, in every country where modern methods of manufacturing and modern means of transportation have been introduced on a large scale. The answer is: Devise and establish a system of law and order among industrial establishments similar to that which governments have ordained to perpetuate, adjust and harmonize the relations and interests of individual citizens. In working out the details of this problem, viz., the organization of industrial establishments into societies of more or less permanence, three principal forms of union have been evolved. These are: the combination, the trust, and the holding corporation.

I. The combination is simply an agreement or contract between independent industrial establishments which limits their former independence in the particulars covered by the contract,

but leaves each free in every other respect. Thus a group of manufacturers agree not to sell below a certain price for a period of one year; this is a price combination. Or they agree to sell only within a certain geographical area; this is a territorial combination. Or to manufacture only a certain quantity during a given period; this is a production combination. Or to share sales according to a pre-arranged schedule; this is a sales combination. Or, to divide the profits in a similar way; this is a profit-sharing combination.

Combinations of the several kinds above described sprang up in the United States during the later sixties and were the characteristic features of the industrial development of the period from 1872 to 1882. During the seventies, combinations were formed in many important industries in Germany and to a much smaller extent in those of England, France and the more advanced countries of the Continent. From the very beginning in the United States these combinations were generally held to be illegal at common law, and by 1890 the common law had been supplemented in a majority of the states by statutes prohibiting the formation of combinations and providing severe penalties for those found to be parties to such organizations. Consequently, while in the various European countries, especially in Germany, where combinations were enforceable at law, consolidations in this form have continued to flourish to the present time. They were generally abandoned in the United States in the eighties and a new and stronger form of union devised to take their place in the industrial system.

II. In the American system the trust was the direct successor of the combination. It is said to have originated in the fertile brain of Mr. S. C. T. Dodd of the Standard Oil Company, although the facts in the case indicate that it was a gradual evolution rather than the invention of any one man. In fact, the trust was the union of three ideas, all of which were in actual operation at the time the trust first appeared. First, the combination of industrial enterprises; second, the development of a common body of stockholders in a group of related corporations, and third, the common law trust.

The first of these ideas had developed naturally enough from the existing conditions, but was found impracticable in the United States, owing to public disapproval enforced through the common and statute laws. The second, was, as appears from the investigations of the United States government, a characteristic of the petroleum industry in the seventies, resulting in the informal trust of 1879. The informal trust of 1879, combined with the two preceding ideas, had all the essential elements of the trust of January 1, 1882, invented by Mr. Dodd especially for the Standard Oil interests.

The trust consisted in simply exchanging stock in a group of related corporations for trust certificates issued by a board of trustees acting for the combination in question. The trustees, being elected by the holders of the trust certificates, were of course responsible to them for the general management of the trust. Their important work, however, consisted in the election of directors for the companies whose stock constituted the sole assets of the trust, and through such directors to operate and control the companies in a harmonious consolidation.

The trust possessed all the advantages of the combination and in addition certain other economies which the combination, on account of its form, could never attain. It could regulate and maintain prices, it could determine and thus limit the output, it could divide territory if such a policy was deemed advisable, it could distribute the work among the several factories in such a way as to secure the lowest cost of production, and by virtue of its organization, the profits were shared in accordance with the value of the several properties consolidated into the trust. In addition to these advantages, all of which might be secured through the combination, the trust made it possible to secure the economies of centralized management and concentrated production. Since the trustees controlled the election of the directors in the several constituent companies, they could through such directors consolidate the administration by appointing a general sales agent, a general manager of all manufacturing plants, a general auditor, and a general treasurer. While the accounts of the several companies must be kept separate, standard methods in all departments could be introduced. The com-

parative method could thus be installed and the efficiency of the various departments tested. Production could be concentrated in the plants where the cost was found to be the lowest, and buildings and sites not so well adapted for manufacturing could be sold for other purposes or abandoned altogether. In short, the trust was an economic instrument capable of securing all the advantages possible under consolidated management.

The trust, having been declared illegal by the highest court, both in New York and Ohio, was abandoned by the several organizations that had been operating under this form of union. The Sugar Trust was converted into a corporation with a New Jersey charter, trust certificates were exchanged for shares in this corporation, the new company purchased the assets of the several corporations which united to form the trust, and several constituent corporations were duly dissolved, the proceeds of the sale of the personal property being divided among the various shareholders. The Standard Oil Trust adopted a different plan. The trust form was of course abandoned, but instead of forming a central corporation, the holders of trust certificates were given in exchange their proportionate part in the shares of the several Standard Oil corporations which made up the original trust. As a result the Standard Oil properties were still united by the tie of a common body of stockholders.

Neither the organization adopted by the Sugar Trust nor that devised by the Standard Oil Company possessed the characteristics necessarily demanded for a permanent form of consolidation. The former, namely, the dissolution of the subsidiary corporations and the sale of the real property and other assets to the central corporation, would in many instances involve the surrender of valuable franchises and other rights inseparably connected with the corporate existence of the subsidiary companies. The more valuable such rights the greater the loss incurred by the adoption of the absolute merger. The latter form, the transference of equal fractional parts of the stock in many small corporations to the same group of stockholders, while obviating the difficulty imposed by the first method, made it probable that the consolidation would be

destroyed sooner or later by the sale of stock to outside interests. What was demanded was a form of organization that insured the perpetuity of the organization, the permanent possession of the franchises and good will of the subsidiary corporations and, in addition, one that not only permitted complete control of the industry, but in addition favored the inauguration of all possible economies of concentration in administration and manufacturing. Such an organization was found in the holding corporation.

The holding corporation was not at this time an unknown institution. It was first used in a modest way by the railroads, and later adopted on a larger scale by the railroad and telegraph companies; finally, in its complete form, it became the direct successor of the trust and the chief instrument of public service and general industrial corporations for the permanent consolidation of entire industrial groups.

In its external structure the holding corporation is identical with that of the ordinary corporation. It is composed of a group of individuals who own stock, elect directors, draw dividends, and in general perform such other duties and possess such other rights as usually belong to shareholders in a corporation. In its internal structure it differs in certain important respects from the usual type. In the first place, its property account is composed of shares of stock in one or more corporations, varying in amount from a minority interest in one small corporation to a majority interest in many large ones. Consequently, since the assests consist of shares in other corporations, the duties of the directors are limited to voting such shares at the meetings of the several corporations, receiving dividends from the subsidiary corporations, and declaring such dividends to its own stockholders as the revenue from its shares of stock may warrant. And, thirdly, in its fully developed form it is an organization by which a considerable number of related manufacturing plants are bound together into a permanent union. Its function, is then, to unite manufacturing corporations, just as the ordinary corporation unites individuals into manufacturing establishments.

As previously stated, a holding corporation may own any amount of securities, ranging from a minority interest in one corporation to a majority interest in a group of related industrial establishments. The first step has no economic advantage and therefore is seldom found, except as a step toward the formation of the second type. The latter form of organization, while permitting the continued existence of all the subordinate corporations, insures under normal conditions their harmonious administration and operation through the control exercised by the central or holding corporation. For it will be observed that since the holding company owns a majority of the stock in each of the subsidiary corporations, the directors of the central corporation are able to elect the directors of the controlled corporations and through their control of the directorates, are able to administer each of the subordinate corporations as though the several properties were owned directly.

This is the condition that normally exists. Suppose, however, that the directors of one of the subordinate corporations having been formally elected and installed in office, differ radically with the directorate of the holding corporation on matters of importance affecting the corporation over which they are placed in authority. Which line of policy will prevail? For the term of their office, the directors of the subordinate corporation, being legally in control, are in a position to carry out their own policies, within the restrictions fixed by the corporation law under which they are acting, notwithstanding the wishes of the directors of the holding company. When their term of office expires, however, the central board of directors, having the control of the election through the right of voting the shares owned by the holding company, are in every case able to depose each of the rebellious directors and substitute others who to them seem likely to remain subservient to the interests of the central corporation. Moreover, it is a common, if not the usual thing, for the directorate of the central or holding company to place enough of their own members upon the boards of the several corporations controlled, to make even the above conditions impossible in fact, altho entirely possible in theory. Under normal conditions, then, the subordinate corporations are

in the long run bound to be operated in the interests of the holding corporation, subject of course to such restrictions as may be imposed by law or custom in the interests of the minority stockholders.

In the United States the legal status of the holding corporation is exceedingly complicated, not by virtue of the nature of such organizations, but on account of the conflict of two jurisdictions, that of the several states and of the federal government. Since each of these jurisdictions is by the Constitution of the United States supreme within its own particular field, and since the Constitution gives the federal government authority over interstate commerce only, the central government has the right to interfere with corporations chartered by the several states only so far as their interstate operations are concerned. That is, a holding corporation, organized under the laws of any of the several states for the purpose of consolidating several corporations, is subject to federal control only so far as it can be shown to interfere with and restrain interstate trade.

The attitude of the several states toward the holding corporation varies widely. Some permit the formation of such corporations without placing any restrictions upon the extent to which the consolidation may be carried; others prohibit the formation of monopolies under any form, but allow holding corporations to be organized and to operate so long as they do not through this instrumentality maintain monopolies; others do not provide for the organization of holding corporations at all; and in a few cases the formation of corporations for the purpose of holding stocks in other companies is definitely forbidden.

In some respects, the most significant of all the cases to come before the courts is that of the Standard Oil Company, recently decided in the Circuit Court. After the trust was declared illegal in 1892, the trustees proceeded to dissolve the organization by an exchange of the certificates for a pro rata assignment of shares in twenty selected corporations which controlled the remaining companies in the original trust. In 1899 the charter of the Standard Oil Company of New Jersey was amended to permit it to purchase, hold and sell the stock of other corporations in this and other countries, and at the same time its capital stock was increased to $100,000,000.

This company then exchanged its stock for shares in the nineteen selected corporations and became the holding company for the Standard Oil interests. Late in 1906 suit was brought in the United States Court by direction of the attorney general of the United States and on the nineteenth of November, 1909, almost exactly three years later, a decision was rendered, declaring the Standard Oil Company of New Jersey, the holding corporation, an illegal combination under the Sherman Anti-Trust Act, and enjoining it from further continuing business in its present form.

It would seem from the conclusions reached in this case that a considerable change in the attitude of the court toward the holding company had occurred since its first decision in 1894. It is entirely possible therefore, that in the future the Supreme Court will hold that monopolistic aggregations of capital in the purely manufacturing field must of necessity directly affect interstate commerce in the commodity manufactured, and that under such circumstances many of our larger industrial consolidations, especially those in the holding company form, may be declared illegal and forced to dissolve, even though their monopolistic power may never have been used to the disadvantage of the public.

While the process of determining the legal status of the holding company has been in progress, neither the states nor the corporations have been idle. Following the lead of New Jersey, thirteen of the other states of the Union have enacted statutes definitely approving the policy of a corporation holding stock in other corporations, and in several of the other states this policy, while not directly sanctioned by statutes, seems to have the silent approval of the administrative officers and the courts. At the same time the corporate interests have eagerly been taking advantage of the opportunities thus offered to consolidate the various industries on the ground evidently, that a consolidation once effected is not likely to be disturbed. This movement has been most marked in the railway domain, where it originated. As shown by the investigation made by the Interstate Commerce Commission in 1906, somewhat less than one-half (46 per cent.) of the total capital stock issued by the rail-

ways of the United States was held by railway corporations, and the practice seems to be increasing rather than the reverse. While no thorough investigation of the situation in the public service field has been made, an examination of the available data shows the same movement, somewhat less advanced, but progressing with great rapidity, especially since 1905, in almost all lines of that important domain. In a large proportion of the cases the consolidation of all the public service companies within a given territorial area is formed, partly for the sake of economy and partly for the sake of monopolistic control. In the strictly manufacturing field the consolidation movement, effected largely through the instrumentality of the holding corporation, may be compared to a volcanic eruption, reaching a climax in the years 1899-1901, and then followed by a period of comparative quiet. In each of the more important industries, a holding company exercises a very large influence, and in some cases practically dominates the industry. In the commercial field the consolidation of mercantile houses has apparently just begun, the Associated Merchants' Company of New York being the most important instance at the present time. The success of this company would indicate that, if such organizations are not prevented by legal restraint, they are likely to become of large importance in the near future.

With the states furnishing the opportunity and in some cases actively approving the consolidation of industrial establishments through the holding company, with the industrial and financial leaders seeking its many advantages, the dangers threatening our industrial system are likely to be overlooked or forgotten. On the one hand stands monopoly with its palsying touch; on the other, the disruption of immense business organizations by order of the judges, bound by law and by every sacred obligation to destroy that which the states and the corporate interests are busy establishing. In order to avoid both of these threatened disasters to our future industrial development, it is evident that a radical change in our corporation law ought to be effected by the states and the federal government acting in harmony.

United States. Industrial Commission. Reports. Vol. I. Part 1. pp. 32-4.

Summary of Advantages and Evils of Combinations.

1. *Advantages*

Those who advocate the formation of large industrial combinations claim that they possess over the system of production on a smaller scale by competing plants the following advantages:

1. *Concentration.*—By closing individual plants less favorably located or less well equipped and concentrating production into the best plants most favorably located a great saving can be effected, both in the amount of capital necessary for the production of a given product and the amount of labor required.

Another advantage of the concentration of industry is that the plants which are kept can be run at their full capacity instead of at part capacity, and can largely be run continuously instead of intermittently, so far as the combination happens to control the larger part of the entire output—a material source of saving in certain lines of industry. A still further advantage of this concentration comes in the selling of the product, from the fact that customers, being always sure of ready supply whenever it is wanted, more willingly buy from the large producer, and that there is less loss from bad debts. This readiness to buy from trusts, however, is denied, some witnesses holding that dealers prefer to buy from independent producers.

In certain lines of industry much greater economy can be practiced, especially in the way of using by-products to better advantage in a large establishment than in a small one. Much difference of opinion exists among witnesses in most lines of industry as to the size of plant that can secure the most economical division of labor and use of by-products, without making adequate supervision too difficult.

2. *Freights.*—Where the product is bulky, so that the freight forms an essential element of the cost, much can be saved by an organization which has plants established at favorable locations in different sections of the country so that purchasers

can be supplied from nearest plants, thus saving the cross freights, which, of course, must be paid where customers are supplied from single competing plants.

3. *Patents and brands.*—Where different establishments, selling separate brands, are brought together into one combination, the use of each brand being made common to all, a great saving is often effected, since the most successful can be more efficiently exploited.

The control also of substantially all patents in one line of industry sometimes enables the combination to secure a monopoly which it could not otherwise secure.

4. *Single management.*—The great completeness and simplicity of the operation of a single great corporation or trust is also a source of saving. Where each of the different establishments which are united had before a president, a complete set of officers, and a separate office force, the combined establishment need have but its one set of chief officers, and subordinates at lesser salaries may take the places of the heads of separate establishments. In this way a material saving is often made in the salaries of the higher officials; while a considerable reduction of the total office force is also possible. It is likewise true that this same form of organization enables one set of traveling salesman to sell all of the brands or all classes of goods for the separate establishments, and in that way much labor is saved. This is considered a great saving from the standpoint of the producer and consumer, but is likewise naturally considered an evil from the point of view of those who are thus thrown out of work.

The more complete organizations also will distribute the work among the different plants in such a way that to each is given the particular kind of product for which it is especially adapted, and in many cases changes in machinery and changes of workmen from one kind of product to another are avoided, a source often of great saving.

5. *Skilled management.*—The bringing into cooperation of leading men from the separate establishments, each having different elements of skill and experience, makes it possible to apply to the business the aggregate ability of all, a factor in

many instances doubtless of great advantage. To some degree there may be a finer specialization of business ability, each man being placed at the head of the department for which he is specially fitted, thus giving, of course, the most skilled management possible to the entire industry, whereas before the combination was effected only a comparatively few of the leading establishments would have managers of equal skill.

But this advantage, some think, is limited. The chief managers at the central office are likely to be large stockholders, and thus to have a strong direct interest in the success of the enterprise. This may hold also of many of the superintendents of departments. But others will be hired managers, and, it is claimed, a hired superintendent will not take the same interest in the establishment or be able to exert the same intelligent control as the owner of a comparatively small establishment. Moreover, minute supervision can not well be exercised in a very large combination.

6. *Export trade.*—The control of large capital also, it is asserted, enables the export trade to be developed to much greater advantage than could be done by smaller establishments with less wealth at their disposal.

2. *Evils*

Among the evils of the great combinations those most frequently mentioned are:

1. *Employees discharged.*—When different establishments come together into one, it is often the case that certain classes of employees are needed in much less numbers than by the independent plants. This is specially true in the case of commercial travelers, and, also, perhaps in the case of superintendents and clerks in the offices. While this is generally admitted, it is considered by many to be an inevitable condition of progress and only a temporary hardship which, like that resulting from the introduction of a new machine, will ultimately result in a greater gain.

2. *Methods of competition.*—The large establishments, by cutting prices in certain localities, while maintaining the prices in the main, have a decided advantage over the smaller com-

petitors whose market is limited to the one field in which the prices are cut, and consequently can often succeed in driving their rivals out of the business.

Connected with this method of competition is also the use of unfair methods, such as following up rivals' customers, bribing employees of rivals to furnish information, etc.

The sudden raising and lowering of prices by the combinations, without notice and apparently arbitrarily to embarrass their opponents, is also considered a great evil.

3. *Increased prices.*—When the combinations have sufficient strength, or for any reason get monopolistic control more or less complete, it is thought that they often raise prices above competitive rates, to the great detriment of the public.

4. *Speculation and overcapitalization.*—Another evil often charged against these newer combinations is that the promoter, by virtue of misrepresentations or by the concealment of material facts, is frequently able to secure very large profits for himself at the expense of the people at large who may buy the stocks, and that in this way undue speculation is encouraged.

Connected with this evil which comes with the modern method of promotion is that of overcapitalization. Stock is frequently issued to four or five, or even more, times the amount of the cash value of the plants that are brought into the combinations. These stocks then placed upon the market go into the hands of persons ignorant of the real value of the property, who afterwards are likely to lose heavily. Pools are sometimes made to control the stock market, or other of the common ways of disposing of the stock by unfair methods are employed.

At times also the officers and directors of the large combinations seem to have taken advantage of their inside knowledge of the business to speculate on the stock exchange in their own securities to the great detriment of the other shareholders.

5. *Freight discriminations.*—Among the chief evils mentioned are those of freight discriminations in favor of the large companies, which many assert are the chief cause for the growth of the great combinations.

6. *Monopoly; its social effects.*—The fact that an organization possesses a practical monopoly and can in that way direct its operations at the expense of its rivals, thereby preventing competitors from coming into the field, it is thought, takes away from the individual initiative of business men and prevents particularly younger men from going into business independently. The formerly independent heads of establishments entering the combinations are also, it is said, reduced to the position of hired subordinates. By these means, witnesses claim, the trusts are in reality sapping the courage and power of initiative of perhaps the most active and influential men in the community. This evil is denied by many of the members of the large corporations, who think that within those corporations are found opportunities for the exercise of judgment and enterprise and for rising in life which do not exist outside.

Annals of the American Academy. 32: 120-4. July, 1908.

Trend of Governmental Regulation of Railroads. Emory R. Johnson.

In speaking of the trend in the policy of the states and of the national government in the regulation of railroads it is not necessary to go back of 1870. In the early 70's there swept over this country a movement very similar to that which we have witnessed during the last five years: a demand for effective and thorough regulation of the railroads by the states. The legislation that resulted from the agitation was called the "Granger laws," because after the movement had started it was taken up and carried to success by the Patrons of Husbandry, popularly known as the Grangers.

In 1870, the position taken by the public, to some extent, and by the railroad corporations, almost without exception, was that the states did not have the authority to regulate railroad charges. The intensity of the Granger movement in the 70's was largely due to the feeling that it was necessary to prove that the states did have the power to regulate public service corporations. The authority asserted by the states was confirmed by the United States Supreme Court in the Granger decisions

of 1876, so that over thirty years ago the principle was firmly established that all transportation rates are subject to legislative control.

Since then it has been a question not of power but of policy. The laws of the 70's, for the regulation of railroads, took three definite forms. One was the enactment of statutory rates—as was done by Iowa in 1874, and by Wisconsin in 1874, when the so-called Potter law was passed. Another method of rate control adopted at that time was the establishing of state commissions with the power to prescribe schedules of rates in some cases; in other instances with the authority only to revise railroad rates, fixed in the first instance by railroads. In some states, notably the eastern, commissions were created with general regulative powers, but without control over rates.

It so happened that most of the Granger laws were passed during the five or six years of serious business depression which followed the panic of 1873. For that reason it was not difficult for those opposed to the laws to establish the contention that the laws had brought about a serious business condition in the railroad world. I do not think any considerable number of impartial students of economic history would now assert that the Granger laws had very much to do with the embarrassment of the railroads from 1873 to 1879. The railroads, like other forms of business activity, suffered from the conditions of the time. To some extent those laws might have contributed to the unhappy condition of the railroads, but the misfortunes of the railroads in the 70's were due primarily to their over-speculation in the past, and to the general business situation prevailing in this country from 1873 to 1879.

It was but natural, however, that a reaction from the early Granger legislation should take place. Many states that had first fixed railroad rates by statutory law repealed their acts. Some states which had established commissions with power to adjust rates took that function away from their commissions. Other states, like Illinois, maintained their commissions with the rate adjusting power. This was the second phase of the development of railway regulation in this country. It was a tendency toward more conservative legislation, a movement that lasted until about 1890.

Shortly before 1890, a movement for more stringent and thorough regulation of the railroads set in, and all the state commissions established from 1890 to 1906, and there were many of them, were what are called "strong" commissions, those having power not only to supervise railroads, but also to regulate their charges. Thus during the last twenty years we have been adhering to the principles, and to some extent to the practice, of the Granger legislation of the 70's.

This third phase of the government regulation of railroads has culminated in two rather distinct tendencies, one of which is the reenactment by many states, of laws fixing statutory railroad charges. These laws of the last five years have, with the exception of those of nine states, applied only to passenger fares.

The other recent tendency has been the establishment of corporation and public utilities commissions. Six years ago North Carolina and Virginia established corporation commissions. giving to the same body of men power over banks, railroads and common carriers other than railroads. Last year the state of New York established its Public Utilities Commissions, one for the state of New York and the other for the city of Greater New York. These commissions have power over the charges and services of all public service corporations. The state of Wisconsin has also given its railway commission powers over public service corporations, and other states are debating the question. This movement represents the latest phase of the evolution of state regulation of railroads.

Along with the growth of the power of the states over transportation there has also gone on a development of national regulation of railroads. The federal act of 1887, although amended in detail from time to time, was not greatly changed until 1906, when the so-called Hepburn bill of the 29th of June was passed. That law expressing the mature judgment of the American people, who had given serious thought to the question for at least a decade, established in statutory form two fundamental principles. There were many minor provisions; but the two really important ones were those empowering the Interstate Commerce Commission to require uniform accounting, and to adjust railroad charges.

The Interstate Commission has prescribed uniform accounting, and the books of the railroad companies are now as open to the government as are the books of banking companies. The business of railroading has in a large measure ceased to be private, and has become open and public. This, in my judgment, is the most important provision in the Hepburn act.

The other new power given the Interstate Commerce Commission is the authority, upon complaint and investigation regarding an existing rate, to name a reasonable maximum rate which the carrier shall charge for a particular service. The commission is not given the general rate making function, but merely the power to make an adjustment, and its authority over charges can be exercised only on complaint and after investigation. Its action must be confined to particular rates.

The federal government now requires that interstate railroad rates shall be public, that the service shall be equitably performed and that the books of the railroads shall be open to the Interstate Commerce Commission. The law further stipulates that if, in the management of that service, unreasonably high or unreasonably discriminatory rates are charged, they shall be adjusted by public authority. This is the present status of national regulation of railroads.

Annals of the American Academy. 24: 89-110. July, 1904.

Federal Power over Trusts. James M. Beck.

Burke once said that the greatest struggles in the English constitutional history have revolved about the questions of taxation. This was once true of our own constitutional evolution as a nation, but in the last half century the irrepressible conflict between the federal sovereignty and the autonomy of the states has had the commerce clause of the Consitution as its chief battle ground. The reasonable elasticity of the Constitution—sometimes erroneously supposed to be rigid and inelastic—is nowhere more strikingly shown than in the expansion of this power to meet the complex problems, to which our concentrated and highly complex civilization has given rise. This is

not due to the conscious effort of any department of the government, of any political party, or of any individual. Mr. Dooley's famous epigram that the Supreme Court follows the election returns was witty, but untrue; but the Supreme Court does follow, as does the rest of the world, the irresistible current of economic developments, with the result to-day that the commerce power has become the awakened and not the "sleeping giant" of the Constitution.

What is commerce? Chief Justice Marshall defined it with the illuminating word "intercourse." He clearly saw that inter-communication between different nations or states, whether it took the form of transportation of merchandise or the transit of individuals or the transmission of intelligence, was the appointed path to national independence and greatness. He therefore refused to limit the word "commerce" to the mere exchange of goods, and, in effect, decided that the general power which each constituent state possessed prior to 1787 over its external relations had become vested in the United States, and that in such transfer it was in no respect diminished, except by the express limitations in the federal compact, such as the prohibition of preferences between different ports of various states and of export and clearance duties. The delegated power was as exhaustive and plenary as that which it was intended to supersede. Commerce, therefore, meant the intercourse of intercommunication of a state with other states, or with the rest of the world.

It was accordingly held in Covington Bridge Company vs. Kentucky, 154 U. S., 204, that the mere passage of a foot passenger from one side of the Ohio river to the other was commerce and the court added:

"And the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool."

Indeed, the mere transmission of intelligence is commerce, and the invisible messages which are being transmitted along telegraph lines from state to state, or those which flash through the deep sea cables, or those which by the genius of Marconi are

transmitted by the "sightless couriers of the air"—all, whether affecting the sale of commodities or not, are equally commerce.

One of the most recent and important cases on this subject is the Lottery cases (188 U. S., 321), where the carriage of a lottery ticket from state to state was held to be inter-state commerce, although the commodity itself was outlawed as purchasable merchandise by the laws of the various states. The extent of the power was argued at great length, and the vital and momentous question was decided as to whether the right to "regulate"—that being the term used in the Constitution—was broad enough to include the right to prohibit altogether. As to foreign commerce, the right to prohibit had been exercised in the first years of the republic by embargoes which were finally sustained, but it was contended that the power over foreign commerce is necessarily broader than the power over interstate commerce, and that the design of the Constitution was to secure absolute freedom for inter-state trade. As to inter-state commerce the right to prohibit had rarely been exercised, except in cases which affected public health, such as the transportation of diseased meat or dangerous explosives, and it was contended that the federal government could not prohibit inter-state shipments for the purpose of regulating the morals of the people, for the reason that such regulation was within the reserved police powers of the states. In the Lottery cases, the Supreme Court negatived this contention and sustained the power of the government to regulate by absolute prohibition. The Court in a learned opinion by Mr. Justice Harlan, said:

"Are we prepared to say that a provision which is in effect a prohibition of the carriage of such articles from state to state is not a fit or appropriate mode for the regulation of that particular kind of commerce—or may not Congress for the protection of the people of all the states, and under the power to regulate inter-state commerce devise such means within the scope of the Constitution and not prohibited by it, as will drive that traffic out of commerce among the states?"

In answering this question, the court in its majority opinion unquestionably laid stress upon the supposed immoral nature of lotteries. It broadly claimed the same right for the federal

government as the state possessed with reference to domestic trade, "to take into view the evils that inhere in a particular form of commerce." But the court continued:

"In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations, except such as may be found in the Constitution."

And then the Court pointedly asks:

"What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which in any degree countenances the suggestion that one may of right carry or cause to be carried from one state to another that which will harm the public morals?"

Here was an affirmative suggestion that at least so far as the public morals are concerned Congress may determine what commodities can be conveyed through the channels of inter-state trade.

The question remains, however, whether this comprehensive power to prohibit is limited to such commerce as in its nature and effect has some relation either to the physical health or moral welfare of the people, or does it extend to any form of commerce or any method of conducting it, which is prejudicial to the public welfare in an economic sense. Could, for example, the federal government exclude from the channels of inter-state trade inter-state shipments by industrial monopolies? If they could, it is obvious that the trusts are to a very great extent subject to federal power. It was this consideration which gave to the Lottery cases exceptional interest. It was justly regarded that the trust problem was in a measure involved. The court did not in words decide the question, but logically it unquestionably did. Possibly remembering that in the Dred Scot case, it has attempted beyond the necessities of the case to solve a political problem, the court refused to say whether its decision necessarily

"Led to the conclusion that Congress may *arbitrarily* exclude from commerce among the states any article, commodity or thing of whatever kind or nature, or however useful or valuable, which it may choose, *no matter with what motive,* to declare shall not be carried from one state to another."

While not deciding any question so extreme, it took occasion to say that the power to regulate "cannot be deemed arbitrary since it is subject to such limitations or restrictions as are prescribed by the Constitution." But the court had already quoted such restrictions and shown that they do not limit the power to determine what form of commerce was prejudicial to the public welfare. The court, in its opinion, had already in effect, and indeed in words, decided that there was no sound distinction between consideration affecting public morals and those affecting the economic welfare of the people; for it had said:

"The Act of July 2nd, 1890, known as the Sherman Anti-Trust Law, and which is based upon the power of Congress to regulate commerce among the states, is an illustration of the proposition that regulations may take the form of prohibition. The object of that act was to protect trade and commerce against unlawful restraints and monopolies; to accomplish that object Congress declared certain contracts to be illegal. That act in effect prohibited the doing of certain things, and its prohibitory clauses have been sustained in several cases as valid under the power of Congress to regulate inter-state commerce.

If, therefore, Congress has the power to declare invalid any contract or combination in the nature of a monopoly which affects inter-state trade, it must of necessity have the lesser power to exclude from the channels of inter-state trade the shipments of such unlawful combinations. Indeed, the act itself provides for the confiscation of all products in process of transportation, and if the goods can be confiscated in course of shipment, they assuredly can be excluded before they enter the channels of inter-state trade.

The Court did not define what it meant by the word "arbitrary", but it apparently meant an act clearly unjustified by "the general welfare", and subversive of the fundamental rights of the people. Such an exercise of power can be imagined. If Congress should deny the privileges of inter-state traffic to any men of a given political party, the ground of the discrimination would be so foreign to any just consideration of the

"general welfare" and so subversive of the fundamental right to life and liberty, that the courts could declare it unconstitutional; but the prohibition of an industrial monopoly cannot be regarded as arbitrary, for in England and America the policy of the law, for five hundred years, has steadfastly set its face against oppressive combinations to control the sale of the necessities of life. It follows that if Congress has the power to prohibit, it has the power to permit subject to such conditions as it may prescribe, and this unquestionably affords a wide field for the exercise of legislative wisdom with respect to combinations of capital.

It has been suggested that all interstate carriers should be required to operate under a federal charter. It would not subject them to any extent to federal power, which is already plenary, but it would enable the federal government to deal with them in a less direct manner. In the Constitutional Convention of 1787, James Madison twice proposed an article authorizing Congress "to grant charters to corporations in cases where the public good may require them and the authority of a single state may be incompetent." The proposition does not seem to have been seriously considered by the framers, although supported by Randolph and Wilson, and was sidetracked without a direct vote upon its merits, probably because so few corporations were then in existence and so little need existed for any. In 1791, Mr. Hamilton, in proposing that a charter be granted to create a bank of the United States, contended that Congress "could create a corporation in relation to the trade with foreign countries or to the trade between the states, because it is the province of the federal government to regulate those objects", and this view the Supreme Court maintained in McCullagh vs. Maryland, where Chief Justice Marshall expressly said that Congress could issue a charter to "a railroad corporation for the purpose of promoting commerce among the states." As a matter of fact, both the Northern Pacific and the Union Pacific railways were originally incorporated under federal laws.

For this exercise of federal authority there was little need as long as the states used judgment and discretion in granting

their charters, and as long as there was a reasonable uniformity between them as to corporation laws. In recent years, however, many states have vied with each other in the shameless and inconsiderate peddling of corporate franchises. In the Northern Securities case the country witnessed the extraordinary spectacle of the governors of five western states, whose policy forbade the consolidation of parallel and competing lines, invoking the protection of the federal government against the pretended powers of a New Jersey corporation.

The difficulty, however, with a federal charter is that its authority is necessarily limited to inter-state trade and can confer none to operate wholly within the borders of a state. This would subject the average railroad to the necessity of two charters, and thus make "confusion worse confounded." In view of the centralizing tendencies of steam and electricity our country will eventually consider the propriety of such an amendment to the Constitution as will grant to transportation companies the right to transact their business throughout the country, whether inter-state or intra-state, under the protection of a federal charter. Such a suggestion would have shocked Jefferson as much as the creation of the bank, and perhaps even Hamilton would not have been prepared for so far-reaching an exercise of federal power. But neither Hamilton or Jefferson ever conceived the possibility of the railroad or the telegraph. Through their centripetal tendencies we are no longer a group of states, united with a slender thread of federal power, but a national organism, whose arteries are the railroads and whose sensitive nerves are the telegraph wires, and this organism can no more be divided as to commerce into separately vital parts than you could divide the human body. As Mr. Justice Bradly strongly said, "In matters of foreign and inter-state commerce there are no states."

Federal Control of Trusts and Combinations in Restraint of Trade Under the Commerce Clause of the Constitution.

H. Findlay French.

Someone has aptly remarked that though the Constitution of the United States was great in what it expressly said, it was infinitely greater in what it left to the interpretation, and in no place is the truth of this statement better exemplified than in the so-called Commerce Clause of the Constitution. At the time this Clause was written, railroads, navigation by steam, telegraph and telephone lines, trusts, in the present sense of the word, indeed all the distinctive elements of modern commerce were quite unknown and even undreamed of, and yet the Clause then framed has been found sufficiently comprehensive to include each successive change in the business and economic world. And despite the fact that Congress did not exercise its power under the Clause until a hundred years after its adoption, yet, when the exigencies of the situation demanded affirmative action, this power was broad enough to meet and regulate wholly altered conditions.

The necessity for legislation under the Commerce Clause had its origin in various causes, among the chief of which were the perfection of steam power and the commercialization of electricity. It was these two causes which made centralization possible, and centralization inevitably led to the formation of monopolies and trusts. There were, however, certain immediate causes which led the trust movement to assume such remarkable importance between the years of 1885 and 1896. The revival of business following the financial depression of 1873, and the phenomenal success achieved by the Standard Oil Company, formed in 1882, were undoubtedly the direct forces behind the movement, but the opportunity for speculation afforded by the ready flotation of corporate shares, together with the Supreme Court's decision in the Sugar Trust suit—a decision apparently legalizing industrial trusts—in a large measure contributed to the final result.

When, therefore, in the natural course of events, business conditions, following the formation of these numerous combina-

tions, had emphasized the necessity for federal action, the question presented to Congress was, under what clause of the Constitution could trust legislation be sustained. As to the regulation of railroads, the greatest of natural monopolies, there was little doubt that the Commerce Clause would apply, but as to trust legislation there was no such unanimity of opinion. The power of the government over patents, the federal power to tax, and the federal power over the mails were all suggested and thoroughly discussed. However, when Congress finally enacted trust legislation, this, like the railroad legislation which had preceded it, was also dependent upon the Commerce Clause.

The Commerce Clause itself is very brief and is contained in Article 1, Section 8, Sub-section 3, of the Constitution: The Congress shall have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This Clause is not to be found in the Articles of Confederation, and it was to a great extent with the object of giving to the federal government a controlling power over commerce that the Constitution was framed. No better nor clearer exposition of the meaning of this Clause has been given than was delivered by Chief Justice Marshall in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, the first and foremost case on the Clause. The Chief Justice said:

> We are now arrived at the inquiry, what is this power? It is the power to regulate—that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. * * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

Indeed, the proposition that the power of Congress over commerce is plenary, and another proposition laid down in the same case—that this power, however, is restricted to interstate commerce, "commerce which concerns more states than one"—have been so often reaffirmed that they almost seem to have become a part of the Clause itself. As to the word "commerce," it is

somewhat difficult to give a clear definition that will express its full meaning, but, broadly speaking, it may be said to include the purchase, sale and exchange of commodities, transportation, and every form of intercourse carried on for the purposes of trade.

The first general law that Congress passed by virtue of its power under the Commerce Clause was the Interstate Commerce Act of 1887. The direct object of this act was the regulation of railroads, but as it contained a provision prohibiting rebates it had an important bearing on the trust problem. The discrimination between shippers which had been carried on through the means of rebates had been a leading feature in the building up of certain trusts, and although the present provision did not entirely eliminate this practice, yet it proved to be of great benefit. The much more recent statute, known as the Elkins Act, which makes both the giver and receiver of a rebate liable, is even more effective in preventing this abuse, and although at first its provisions were partially evaded by a skillful juggling of books, yet the amended Interstate Commerce Act of 1906, providing as it does for a uniform system of bookkeeping, seems to make the present laws sufficient to meet the needs of this aspect of the case.

The Interstate Commerce Act also contained a section prohibiting railroad pools, under which form of combination the railroads had maintained rates for both freight and passenger traffic. On account of the greater adaptability of the Sherman Act few suits have been instituted under this provision, and but two of these, very indirectly bearing upon the subject, have ever reached the Supreme Court. Moreover, at the present time, there seems to exist a wide-spread opinion that this provision is unnecessary and unwise—an opinion based on the ground that the broad supervision which Congress now exercises over the railroads would minimize the evils arising from pools while preserving their advantages. Certainly there can be no doubt that the consolidation of numerous railroad lines was for the most part due to the illegality of pools, and it is, therefore, probable that Congress will modify existing prohibitions upon this form of agreement.

Turning now to a more direct form of monopoly and trust regulation, it will be found that the first law on the subject, popularly known as the Sherman Anti-trust Act, was not passed by Congress until July, 1890, three years after the passage of the Interstate Commerce measures. The Act had, indeed, been introduced almost two years before its adoption, but the numerous substitute measures offered—more than a hundred in number—delayed and, in many cases, militated against its final passage. But the pressure of public opinion which had been steadily demanding restrictive trust legislation prevailed, and the Sherman measure was finally enacted in the essential form in which it stands today.

The Act was entitled "An act to protect commerce against unlawful restraints and monopolies." The first section declared "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations" to be illegal. Any person making such combination or conspiracy was declared guilty of a misdemeanor, and such offense was punishable by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the Court. Section 4 gave the United States Circuit Courts jurisdiction to prevent and restrain violations of the Act, and it was made the duty of the United States District Attorneys to institute proceedings against all combinations in restraint of interstate trade. Other sections made trust property confiscable when in process of transportation from one state to another, or to a foreign country, and gave to any person injured by the doing of anything prohibited by the Act the right to recover threefold damages, costs and attorneys' fees.

It will readily be seen that while the provisions of the Sherman Law were most comprehensive, the language used was somewhat vague and uncertain. Though the Act was criminal in its nature, no attempt was made to define just what state of facts was necessary to constitute the crime. For this and other reasons, the correctness of which seemed to be supported by some of the early decisions of the lower courts, it was quite generally supposed that the Act was useless, and contained loopholes so

large that "a coach and four could be driven through them." As late as 1893 Attorney General Olney considered the Act both ineffective and illegal, but subsequent events demonstrated that the statute was not wholly futile.

However, some of the apparent omissions of the Act, such as failure to define the word trust, were not wholly harmful, for had the measure attempted to lay down any rigid definition of a trust, rapidly changing business conditions would have soon rendered the definition obsolete. Perhaps the best working definition, which includes every form of illegal combination contemplated by the Sherman Act, is one defining a trust as any combination by which non-competitive prices are maintained without fraud, violence, or slander, and the most recurrent form of organization is, of course, a combination the shares of which are exchanged for the shares of the several uniting companies.

It will not be out of place to summarize the salient principles which have been established under the provisions of the Act during the nineteen years it has been in force. Bearing in mind other decisions of the Supreme Court closely related to the present subject, the rulings would seem to be as follows:

That Congress by virtue of its power to regulate interstate commerce may forbid any contract, combination or conspiracy, whether arising out of a boycott, out of a transaction of purchase and sale, or however else formed, when the result is to confer on two or more persons the power to restrain interstate commerce, whether or not such power is used; that it is immaterial whether the restraint imposed is reasonable or unreasonable, and that the amount of interstate commerce involved is practically immaterial, but that such commerce must be more than incidentally affected; and, finally, that though an illegal combination may enforce a collateral contract for the purchase price of goods, yet it cannot enforce a contract for the purchase price when such contract forms one of the essential features of an illegal scheme.

In connection with the proceedings instituted under the Act, it should be mentioned that the enforcement of the Sherman measure has been greatly facilitated by the enactment of several laws making the testimony of witnesses compulsory, and grant-

ing immunity to the persons so testifying. These laws, together with the Expediting Act of 1903, which provides that in important cases (brought under the Interstate Commerce or Sherman Acts) where the government is the complainant, a direct appeal may be taken to the Supreme Court, have proved of much practical effectiveness in the enforcement of trust legislation.

Aside from the decisions under the Sherman Law, the Act itself has been subjected to the severest criticism. It has been criticised for being too broad, and again for not being broad enough; sometimes for being ineffective, and at other times for being too efficacious. Many have held the opinion that by its failure to distinguish between the good and bad features of monopoly organization it has not only retarded commercial development, but has prohibited legitimate enterprises which would have resulted in an increase of public welfare. Moreover, there can be no doubt that although from a theoretical standpoint the Sherman Law prohibited every combination in restraint of interstate commerce, yet in practice less than one per cent. of the large trusts have been prosecuted successfully. Even admitting that the influence of the law has been beneficial, actual results would seem most meager if it were not remembered that the government has seldom tried to invoke the Act, except in especially flagrant cases on the rather reasonable ground that it was too dangerous to the innocent to be enforced against the guilty.

American Railway Transportation. pp. 422-7.

Emory R. Johnson.

The problem of railway regulation has been merged to some extent with the general and larger problem of the public control of corporations. This has come about mainly in two ways: by the application of the Sherman antitrust law of 1890 to railroads and by the passage of the Elkins law of 1903. In enacting the Sherman antitrust law Congress had only industrial combinations in mind; but the rulings of the Supreme Court have made the law an important part of our legislation for the regulation of railroads. Indeed, the interpretation of the law thus far has

been to give it a wide application to inter-railway relations and a more limited influence upon the relations of industrial corporations with each other. As a measure for the control of inter-railway relations the law is faulty in that it makes illegal practically all cooperative action on the part of rival carriers. The public interest requires the joint action of carriers in making and maintaining rates, and the problem of preventing railway discriminations has been complicated instead of simplified by the Sherman Antitrust Act. There are undoubtedly various kinds of combinations among railroads that are opposed to the public welfare, and it is quite possible that such deleterious combinations may be reached by the law of 1890. The necessity seems to be for the modification rather than for the repeal of the law.

The urgent demand for federal legislation for the regulation of the "trusts" led to the passage of the Elkins law, which was intended to prevent unjust discriminations in railway charges. Instead of amending and developing the Sherman act of 1890, Congress chose to give the new Department of Commerce and Labor certain inquisitorial powers over corporations, and, by the Elkins law, to make it more dangerous and more difficult for the large shippers to secure special and discriminating rates. The theory of the Elkins law was that the greatest advantage over the independent producer which the "trust" can secure is a special rate from the railroads, and the framers of the law believed that the elimination of unjust discriminations would help to prevent large corporations from oppressing the public. The thought back of the Elkins law, as an antitrust measure, was that with equality of advantage as regards transportation, the small producer can prevent the large producer from monopolizing the field of production and exacting extortionate charges from the consumer. The law proved successful and three years later it was incorporated in the Hepburn act. The theory upon which the law is based has much to commend it.

The Elkins law immediately strengthened the legislation for the regulation of railroads. The corporation, as well as the officer or agent, became liable to prosecution for a violation of the law; the imprisonment clause of the interstate commerce

law was repealed, but was restored by the Hepburn act of 1906. The penalty for deviating from the published and lawful rates is a heavy fine of not less than $1,000 or more than $20,000 for each offense, and the acceptance as well as the offer of a rebate or discrimination is made a misdemeanor. The Elkins law also gave statutory authority for the issue by the United States circuit courts of writs of injunction ordering carriers not to charge less than the published rates and not to make any discrimination forbidden by law. Although this authority has been exercised by the federal courts in 1902, there was some doubt as to the power of the courts to take such action. The Wilkins law empowered the Interstate Commerce Commission to petition for such an injunction whenever it has reasonable ground for belief that discriminations are being practised, and the law makes it "duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute the proceedings provided for by this act." The law of February 11, 1903, insures expeditious and speedy determination by the Circuit Court of all cases brought for the enforcement of the law. "An appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

While legislation has fixed the general scope of the governmental regulation of transportation, the efficiency of governmental control has been determined mainly by the actions of the courts in interpreting the law and in exercising their equity powers. There were few changes made by Congress in the act to regulate commerce passed in 1887, until the Elkins act of 1903 and the Hepburn law of 1906 were enacted, but the decisions of the federal courts resulted in an important organic growth in the laws to which public carriers were amenable.

With the exception of the act approved February 11, 1893, strengthening the power of the Interstate Commerce Commission to compel witnesses to testify and produce documentary evidence, the changes made in the law of 1887 before the passage of the Elkins act related to relatively minor details. Two sup-

plementary laws of importance to the public welfare were enacted. One act was the safety appliance law of March 2, 1893, requiring the railroad companies to equip their cars with automatic couplers and their engines and cars with power-brakes. The other act was approved March 3, 1901, and requires all railroad companies engaged in interstate commerce to make full monthly reports to the Interstate Commerce Commission of all accidents. These supplementary acts, while constituting a valuable addition to our laws, did not deal with the main problem of government control of transportation, the regulation of rates and the prevention of discriminations. Though annually urged by the Interstate Commission to recast and strengthen the main provisions of the act of 1887, so that the commission might at least possess the powers which that law was intended to confer on that body, Congress did not act until it passed the acts of 1903 and 1906, when the agitation for the regulation of trusts and large corporations resulted in the Elkins and Hepburn laws to restrict discriminations and regulate railroad charges.

Although Congress was very slow to change the act of 1887, the decisions of the courts had, by 1907, left the Interstate Commerce Commission without effective power to adjust railway charges. The task of protecting shippers from unjust transportation charges had fallen increasingly to the Federal courts; but although the activity of the courts had been beneficial, the necessity for the further development of legislation regarding railway regulation and the desirability of keeping the Interstate Commerce equipped with effective powers became apparent by 1903. For, however active and intelligent the courts may be in dealing with transportation questions, they can not adequately cope with the economic problem of rate adjustment. The actions of the courts must be mainly negative and preventive; their methods of procedure are such that the courts are not so well adapted as a commission is to deal constructively with such a complicated and varying economic problem as the supervision of transportation charges and their equitable adjustment among the rival social and economic interests. This fact is now generally recognized in the United States, although there are differences of opinion as to the nature of the powers that should have

been given the Interstate Commerce Commission. This accounts for the fact that there was a virtual deadlock in legislation for some years before President Roosevelt's great influence brought about the enactment of the Hepburn law.

The interest of the public in the problem of railway regulation is lessened by business prosperity, because during such a period railway discriminations are much less frequent than during years of industrial depression. When overrun with traffic a railroad company may be expected to observe its published rates in its dealings with all people except possibly a few of the largest shippers who are in a position to offer traffic in train-load lots to two or more railroad companies. But the elimination of personal discrimination due to unlawful deviations from the published rates does not end the necessity for government regulation. A proper adjustment of rates means, first, that the published rates shall be what they ought to be, and second, that the published rates shall be maintained until they become unreasonable and others are substituted for them according to methods prescribed by law. Inasmuch as past experience has clearly demonstrated that the interplay of rival private interests can not be expected to secure the equitable adjustment of railroad charges, we must in the future, as we have in the past, endeavor by effective public regulation to minimize the inequities certain to arise in the charges imposed by the carriers engaged in performing the transportation service for a country so large as the United States.

Quarterly Review. 207: 28-57. July, 1907.

President Roosevelt and the Trusts. Simon J. McLean.

Under legislation enacted in 1903, on the recommendation of the President, provision was made for publicity in regard to corporate affairs by the establishment of a Bureau of Corporations, a sub-department of the new department of Commerce and Labour. Mr. James R. Garfield, a son of the late President Garfield, was appointed Commissioner of Corporations. He was given power to investigate the business of corporations, joint-stock companies, or corporate combinations engaged in inter-

state commerce; and to gather information to enable the President to make recommendations to Congress in regard to the regulation of interstate commerce. The reports made to the President are to receive such publicity as he may direct. Under this legislation investigations of the conditions existing in the beef and oil industries have been conducted by Mr. Garfield. The work of the Bureau of Corporations is primarily an enquiry into the industrial and legal methods used by the agencies engaged in interstate and foreign commerce; and the purpose of such enquiry is to afford accurate knowledge of the industrial conditions upon which there may be based intelligent legislative action.

Outlook. 95: 451-2. July 2, 1910.

Important Congressional Action: Railway Law.

Of the measures passed by Congress at the present session, three stand out as far-reaching in consequences. One of these bills will vitally affect the whole transportation system and commerce of the country. That is the new Railway Law. The Railway Law marks an astonishing advance in the movement on the part of the American people to control for the public welfare the highways of trade and travel. It establishes a court to be known as the Commerce Court, composed of five judges assigned from among the Circuit Judges of the United States by the Chief Justice of the United States for a period of five years. This Court has no larger jurisdiction than that now exercised by the Circuit Courts; but it is to have the exclusive function of hearing and deciding cases brought for the purpose of enforcing or setting aside orders of the Inter-State Commerce Commission and certain other classes of cases for the regulation of inter-state commerce. Appeals from this Court may be taken to the United States Supreme Court. In all such cases the United States itself, rather than, as at present, the Inter-State Commerce Commission, is to be a party, and is to be represented by the Attorney-General's office. The Inter-State Commerce Commission and interested shippers may, however, be represented by counsel. Every common carrier subject to the act must designate an agent in the city of

Washington as a representative on whom service of notices and processes may be made. Telegraph and telephone companies are made subject to the act, as express companies and sleeping-car companies are included among common carriers. Common carriers are forbidden to charge more for a short haul than for a long haul except as they succeed in demonstrating to the Commission that they should be relieved from the prohibition. If a railway in competition with a water route reduces the rates on any kind of freight, it is not permitted to increase such rate, unless after a hearing by the Commission, it is shown that an increase "rests upon changed conditions other than the elimination of water competition." Common carriers are held responsible for correctly informing shippers of the authorized rate. The Inter-State Commerce Commission can not only investigate complaints as at present, but may institute an inquiry on its own motion. It may also suspend rates in advance of their going into effect pending an investigation of their classification, and may continue the suspension for ten months beyond the thirty days after the filing of the rates when such rates would naturally go into effect. The Inter-State Commerce Commission may establish through routes, and is also given greater leeway in the matter of requiring common carriers to file reports. Finally, a special commission is created to investigate questions pertaining to the issuance of railway securities.

Craftsman. 19: 72-7. October, 1910.

How the Real Interests of the Railroads Are Served by Restrictive Legislation. Gustav Stickley.

The most significant feature of the general rejoicing over the enactment almost in its entirety of the railroad bill approved by President Taft, is the attitude of acquiescence and willing cooperation taken by the railroad officials themselves. This change of heart toward the question of government supervision was plainly indicated by the outcome of the recent conference of railroad lawyers at Portsmouth. The details of this conference are not known, for the meetings were held behind

closed doors and the members refused to give out any definite information concerning it. Yet it is known that the consensus of opinion among the sixty-five attorneys, who bear so large a part of the burden of adjusting the operation of the railroads to meet the demands of the Interstate Commerce Commission, is that there is very little likelihood of any action toward further strife and antagonism. For this reason the conference is believed to mark the opening of a new era in the relations between the government and the railroads.

We all remember the rejoicing which greeted the enactment of the Hepburn Law in nineteen hundred and six. It was regarded as the crowning achievement of President Roosevelt's administration, in that it extended and strengthened the powers of the Interstate Commerce Commission so that for the first time in its history it became a force to be reckoned with. The present law is welcome because it marks a further advance along the same line of legislation,—which has the elements of permanence because it is constructive as well as restrictive.

The uproar of the seven-months' contest in Congress has hardly died away, and we are just beginning to appreciate the gallant work done by the progressives in forcing through the greater part of the President's projected amendments to the Hepburn Law in the face of all the opposition the reactionary element could bring to bear, and also in eliminating from the bill certain clauses which would have nullified instead of strengthened some of the more important provisions of the Hepburn Law. As it stands, the new bill clinches all that was accomplished in ninteen hundred and six, and also provides for a number of things which even four years ago would have been considered dangerously radical. For example, the former law defined as common carriers, express companies and sleeping-car companies as well as railroads, but the new bill adds to these telephone and telegraph companies, which are thus included equally in the public service. The Hepburn Law allowed the Interstate Commerce Commission to investigate and decide a difficulty only when a complaint had been filed by the person aggrieved; the new bill makes a change of vital importance in permitting the Commission to institute proceedings

on its own motion and without waiting for complaint to be filed. Under the provisions of the former law the Commission had authority only over rates and charges, but as amended the law now extends that authority to include all regulations and classifications which may in any way affect rates or the interests of shippers. The whole matter of rate regulation is changed by the provision in the present bill, which authorizes the suspension of any proposed rate regulation or classification for a period not exceeding eleven months, pending investigation by the Commission. This gives the Commission real power to regulate rates, a power which it lacked when the law authorized proceedings only after a rate had gone into effect. The court review clause of the old law, so productive of tedious delays, has been amended by the creation of a special Commerce Court, which will devote its entire attention to cases growing out of the Interstate Commerce Law. And one of the most important provisions of the new law is the placing on the railroads of the burden of proof in all judicial proceedings whereby it is sought to waive the decisions of the Interstate Commerce Commission, thus relieving the shipper of the burden of carrying legal cases up to the higher courts.

The clauses providing for the physical valuation of railroads and federal control of stock and bond issues were eliminated, but a step in the right direction was secured in the form of a clause authorizing the appointment of a commission to investigate the general subject of securities of common carriers. The famous long-and-short haul clause was naturally the subject of a hot contest, as it aims to prevent carriers from charging more proportionately for a short haul than for a long haul, except with the approval of the Interstate Commerce Commission. This provision was finally adopted, but the chances are that it will be some time before either rate regulation in general, or the adjustment of equitable rates for the long and short haul, will be put on a practical working basis, as the question of regulating railroad rates so that justice will be done to all parties is almost as complicated a matter as the revision of the tariff. The railroad interests secured the elimination of the clause recommending that the purchase by

one railroad of the stock of a competitor should be prohibited; a valuable concession when considered with reference to the present organization of the railroad system all over the country. But they failed to win the repeal of the Antitrust Law as it relates to the railroads, the legalization of traffic agreements without the approval of the Interstate Commerce Commission, or the legalization of railroad mergers.

The railroads are not a thing apart, but are identified with every phase of our national life. Without them there could have been no development of the country; none of the tremendous industrial growth which has made us one of the great powers of the world. In the early days, when the need of adequate transportation was so urgent that the people were ready to sacrifice anything to open the lines of communication from one part of the country to another, every new railroad enterprise was greeted with a fresh burst of popular enthusiasm, accompanied by such substantial marks of approval as princely grants of public lands, state subsidies, and franchises that practically gave to the railroad companies the earth and all the fulness thereof for an unlimited term of years. The popular attitude was voiced in a toast offered by an ex-Governor of Massachusetts at the opening of the Boston and Worcester Railroad: "Railroads: We are willing to be rode hard by such monopolies." People scorned the idea of limiting the charters and franchises which they granted to their railroads by imposing such restrictions as were adopted by the more cold-blooded and far-sighted governments of Europe. The man who would build a railroad was a public benefactor, and deserved nothing less than an absolutely freehand to do what he would.

Under these circumstances it was not remarkable that the railroad men should regard their roads less as public highways than as private lines of transportation in which they had an undisputed property right, and the use of which they could sell to the people for anything they chose. Nobody said them nay, so when there were enough of them to make competition really interesting, it was but natural that they should indulge in rate cutting, secret rebates and all the other weapons employed by each company to get business away from its rivals, without

thought that they were carrying on anything other than what they regarded as legitimate competition. Powerful influences were brought to bear as the great industries spring into being under the stimulus of low freight rates, and discriminations between one town and another, as well as between one shipper and another, grew up as naturally as weeds in rich soil. The people began to regret their former lavishness in the matter of franchises and privileges, and to remember that in other countries railroads were regarded as public highways belonging by natural right to the whole people, and not as private enterprises of which the control was centered in the hands of the powerful few. The great body of stock-holders was helpless, because all control was vested in the board of directors, who in turn acted at the dictation of an executive committee which was practically supreme. Matters were made worse by the disregard shown for the interests of small investors and stock-holders, and the tangle of bankruptcy, receiverships, reorganization and consolidation soon brought about a general demand for legislation that would help to straighten things out. State commissions were appointed in a number of the states, and the long battle began.

The crux of the whole matter was the question as to whether the railway should be regarded as a public highway or as a private enterprise. The position taken by the people was that it was imperatively necessary to the national welfare that they should be regarded as public highways. On the other hand, the railroad officials, realizing better than anyone else could the immense effort, the courage and the genius for construction and organization that they had put into the upbuilding of the railroads, resented hotly what appeared to them as an unjustifiable effort to take away their freedom of action. Their point of view was that they had as much right to show favoritism as any other business organization, if favoritism proved the best way to get business, and that if they chose to cut rates down to the bone in one place and raise them to the breaking point in another; to carry one man's goods at a rate that made it impossible for his rivals to compete with him, and to grant passes, franks and all sorts of privileges to

others, it was their business and theirs alone. And this point of view was made considerably stronger by the fact that large blocks of railroad stock were held by the powerful corporations which found it necessary to control the main lines of transportation. The system of rate cutting and rebates, originally entered into as a "smart" business move, became a veritable boomerang and, as the big shippers grew more rapacious and the multitude of small shippers more hostile, the railroads found themselves between two fires,—fires which were fanned by every new restrictive law that was passed. The big shipper was usually a big stock-holder,—often a director in several railroads,—and his interests were catered to, perforce, at the expense of the small stock-holder, whose dividends were necessarily diminished by every new drain which brought down the net earnings of the railroad.

The tide began to turn with the passing of the Interstate Commerce Law and the appointment of the Interstate Commerce Commission in eighteen hundred and eight-seven, but the law was so tentative in its provisions, and the Commission had so little real power, that no really effective action was taken until after the passage of the Hepburn Law four years ago. It was fought, of course, by railroad companies and trusts alike, but the result has been that the position of the railroads has grown stronger each year. The rigid prohibitions with regard to rebates, franks and free passes have naturally had an immense effect upon the annual report of new earnings. The law has been evaded, but the evasions have been a mere drop in the bucket compared to the enormous leakages that went on before the government stepped in and put a stop to the exorbitant demands of the big commercial interests. Every restriction has done more to protect the railroads—and therefore the thousands of stockholders who own railroad securities—than to hamper them; a protection that is vitally necessary in a business world where the interests of different concerns are so inextricably intertwined that it is almost impossible for the common carrier, which to a great extent is dependent for its very existence upon the good will of the others, to refuse to submit to any demand. Now the government steps in and inter-

poses the strong shield of the law. The whole railroad system is lifted into the realm of a recognized public service, and the powers of the railroad officials are clearly defined. They are in a manner regarded as trustees of property that in the last analysis belongs to the whole people, and the very laws that restrict their freedom of action in administering it and disposing of it, also relieve them of embarrassment and hedge them about with vastly improved economic conditions that can only result in a stronger organization. In effect, the law that regulates rates puts money into the pockets of the railroad companies to an extent that has never obtained before, for it practically insists that they shall charge full price for services which they have been in the habit of rendering free to anybody who was strong enough to demand a place on the free list. Moreover, the law protects the railroad companies from one another, for it has practically established the whole system as a monopoly to be carried on under government protection as well as supervision.

Journal of Political Economy. 18: 221-2. March, 1910.

Incorporation under Federal Law.

An important step in furtherance of the programme of the Taft administration for the passage of "constructive legislation" has been taken in the presentation to Congress of a bill drawn by Attorney General Wickersham and providing for the incorporation of enterprises under federal law. The measure is the result of several weeks of work on the part of the attorney-general preceded by months of cabinet and other deliberations. It has been introduced in the two houses of Congress by the chairmen of the Judiciary committees, making its appearance in the lower chamber as H. R. 20,142. The bill provides for the formation of corporations by any five or more persons to engage in trade between the several states or with foreign nations, etc. Such a concern is to have a capital stock of not less than $100,000 and the articles of incorporation are to state what part of the capital is to be contributed in property other than

money. The Commissioner of Corporations is vested with authority to examine the articles and to ascertain that they comply in all respects with the terms of the law. Corporations thus formed are to have all the powers usually granted to trading corporations but no such corporation thus formed is to be allowed to purchase, acquire or hold stock in any other corporation. No corporation is to be allowed to engage in the banking business in any way. Two or more kinds of classes of stock may be issued by the concerns and the usual "stock books," etc. are to be kept. All of the ordinary financial powers, of assessing stock and the like, are vested in the board of directors. In sec. 17 is found the provision that while the corporations may purchase any property that they need for their regular business, they shall be required to file in the office of the Commissioner of Corporations before issuing any stock in payment for such property a statement describing the property, stating the number of shares issued, the terms of any existing agreement for the transfer of such property, and other material information. A statement of the value of the property made by two disinterested appraisers is also to be filed. Reports of business are to be filed with the Commissioner of Corporations each year, and provision is made for the forfeiture of the charter of corporations which have violated the terms of such charters. The proceedings against the concerns may take effect either through the appointment of receivers at the request of the attorney-general or by the passage of an act of Congress.

The federal incorporation act is lengthy and goes in detail into the various regulations and methods of control which are thought to be necessary for the proper regulation of the concerns to be organized. Thus far no serious attention has been given the measure by the committees in charge and nothing more is likely to be done at the current session of Congress than to hear testimony regarding it. Both President Taft and the attorney-general have however heartily indorsed the measure and the passage of some such bill will undoubtedly be made a cardinal feature of the programme of the government during Mr. Taft's retention of the presidential office. The measure is

already looked upon with alarm by all believers in states'-rights doctrines as well as by those who foresee in such a plan an unavoidable interference with the fiscal systems of the several states due to the prospective abandonment by corporations of their state charters in favor of charters to be obtained from the national government.

Current Literature. 50: 362-5. April, 1911.

Railway Regulation a Fact at Last.

The American railroad still survives! Last month came the decision on the proposed increase of rates. For three years the railway officials have been telling us how necessary such an increase is if the roads are to meet the demands of the future and maintain their credit. For several months railway attorneys literally by the score have been pleading before the interstate commerce commission and documentary evidence literally by the cord has been at times seen in the stuffy little room on F street, in Washington, where the later hearings were held. The eloquence of the attorneys was in vain. The corded evidence was futile. The decision was a positive denial to the four hundred and fifty roads involved of the coveted privilege of increasing rates at this time. The blow fell unexpectedly, for the railway men up to the very last expected some concessions. But the impending ruin did not come to pass. For a day or two stocks fell off a little in Wall street and in London. Then the market steadied again.

At almost the same time that the commission was refusing to allow the railroads to raise their rates, something else of perhaps equal importance happened. Thirteen decisions were handed down by the Supreme Court of the United States and eighteen orders were issued. The decisions were in regard to various acts of the interstate commerce commission in the past few years in the regulation of the railroads. "Not for years," said the Associated Press despatches from Washington, "have so many far-reaching principles of interstate commerce been fixed by the Supreme Court of the United States as were

established in its decisions to-day." These decisions upheld nearly all the important regulative acts of the commission in the last few years. A few days later representatives of the roads both east and west met in conference and decided not to contest the rate decision in the courts, but to comply at once with the request of the commission to restore rates to the former basis. The fight was by this time all taken out of them.

Between Congress and the interstate commerce commission and the Supreme Court, governmental regulation of the railways of the country has at last become a fixed fact. The real purpose of the roads in seeking advance rates was, according to the commission, "not so much to secure approval of these specific rates as to discover the mind of the commission with respect to the policy which the carriers might in future pursue, and to secure, if possible, commitment on its (the commission's) part as to a nation-wide policy which would give the carriers a loose rein." If that was the purpose of the roads, says Financial America, "they know now that instead of a free rein they are likely to operate under a check and curb." In other words a long and tremendously important contest has within the last few weeks come to an end. The status of the railroads has at last been decided and accepted. The result marks the close of an old industrial era, in which the railroad corporations seemed to dominate over state legislatures, to defy federal control and to laugh at public sentiment. "The public be damned" stage of railroad history has ended. "The day of gigantic exploitation," says the New York World jubilantly, "is over, and railroads will have to run as railroads, not as banks and stock-jobbers. For twenty-five years the men in control of American railroads have resisted every attempt at railroad regulation in the public interest. At last the country has the upper hand and will keep it. If the railroad presidents wish to destroy their own credit in order to flout the United States government, the government will still survive."

National Conference on Trusts and Combinations, Proceedings. 1907. pp. 148-56.

Trust Situation. Jeremiah W. Jenks.

The task before me this morning is simply to sum up, as briefly as possible, the progress that has been made during the last few years in the investigation of the questions regarding corporations, and to state even more briefly two or three of the problems of to-day. Of course, I am not taking the responsibility of the opinions expressed, but my aim has been to express the opinions, generally speaking, of all thoughtful men on this subject.

At the time of our first great conference on trusts, eight years ago and more, there was great public excitement on the subject. Many people feared that private competition would be practically abolished in all lines of industry; legislation was pending in several of the state legislatures, and the feeling of apparent desperation on the part of many persons was so strong that the conference felt the great need was for more light.

An Epitome of Progress

After that conference, for a period of two or three years, the formation of the great combinations of corporations continued, several of the larger ones, including the United States Steel Corporation, being formed.

Now that tendency seems to have been checked, probably because the lines of industry best adapted for such organizations have been well organized. Since then, also, there have been many restraining acts by different state legislatures; many important decisions in state and federal courts have been made; there has been time for much commercial experience. This, then, is the time to take account of the work that has already been accomplished by legislative and judicial action and by business experience. This conference should be able to make a positive and exact statement of legislation still needed.

1. Without attempting to review all the recommendations made then, or all of the lessons which have been learned

since that time, some of the most important may be briefly considered.

Railroad Discrimination

(a) The investigations of the United States Industrial Commission of the United States Bureau of Corporations, and the decisions of several courts, have established beyond question the fact that railroad discriminations of various kinds have been a source of very large profits to most of the important combinations, and have doubtless been a leading feature in building up their strength, even when they have not been a direct cause of their organization. Even before this fact had been fully established, laws had been passed in several states and by Congress forbidding such discriminations and imposing a severe penalty. The administration of these laws has of late been fairly efficient, and within the last two or three years especially there is reason to believe that this evil has been at any rate very greatly lessened. Even without further legislative action in that direction, it seems certain that time and experience in administration will enable these laws to be progressively more efficient as the knowledge of conditions increases.

(b) Besides the direct intervention of the courts, the Interstate Commerce Commission can now, under the legislation of the last Congress, prescribe the method of bookkeeping for the railroads, and can thus with much more certainty detect and make public any abuse contrary to law. This power will doubtless be exercised so as to greatly assist the executive, the courts and the public, to say nothing of the consciences of railroad auditors and treasurers.

Influence of the Tariff

(c) The protective tariff was then declared by some to be the "mother of all trusts," by others to have little effect in creating or in favoring the development or prosperity of the combinations. While this question is still more or less debatable, it may be stated positively that investigations have already shown that, while the protective tariff cannot be said to be directly the cause of the industrial combinations, it has doubtless, in many in-

stances, protected some of them from fierce foreign competition, and has thus aided them decidedly in controlling the market and in increasing prices. On the other hand, it may be stated with equal positiveness that other combinations have received practically no aid from this source, and yet, without such aid, have been able to hold their own against the competition of rivals. There still remains a very important work to be done in the way of investigation of the relation between the protective tariff and the industrial combinations, but in my personal judgment conservative, remedial legislation in the way of modification of the present tariff laws will prove to be very desirable.

Effects of Eliminating Competition

(2) The industrial combinations, it has been proved, have many times checked competition very decidedly. They have driven weak rivals to the wall, and even without the aid of tariff or railroad discriminations have attained a monopoly to so great an extent as to give them for the time being, within considerable limits, control of the market and the power to fix prices. On the other hand, experience has shown that when they have used this power arbitrarily, they have not stifled competition. New rivals have continually sprung up to plague them, and the efforts to abuse their power have been costly to a serious degree. The result of this experience is that many of the stronger, more conservative and more successful of the great combinations are no longer reckless in their attempts to fix prices. Indeed, unless managers of the corporations are expecting to reap a quick harvest on the Stock Exchange and then to sacrifice the interest of their stockholders, these reckless attempts to control the market prices of products have been practically abandoned. The experience of the last ten years seems to show that combinations will continue, but that usually they will not overthrow competition, and that the field for their arbitrary action in fixing prices is strictly limited.

Problem of Capitalization

3. Long before the time of the last conference, overcapitalization had been generally recognized as one of the great evils

of corporate organization, an evil much exaggerated in the formation of many of the great industrial combinations. This evil, too, has in part been cured simply by business experience. Investors have become more cautious on account of their poor investments; the bankers and underwriters, from their difficulties in floating so large amounts of "undigested securities"; but legislation also has played its good part in lessening this evil. It seems now to be generally recognized that effective means can be found of restricting capitalization within reasonable bounds. In some of the late court decisions, also, especially in the state of New Jersey, promoters have been held rigidly responsible for misrepresentation in connection with the organization of corporations, and when it has become clear that some persons, acting merely as "dummy directors" have overloaded the capitalization with worthless securities, the real culprits have been held personally responsible. Doubtless such decisions, even under present legislation, if they are steadily followed up in different states and in federal courts, will largely do away with the evil.

There still remains, however, to be settled finally the sound principles of just capitalization. Shall the basis of capitalization be a reasonable valuation of tangible property, or shall it be considered just and legal to capitalize also a reasonable earning power or a good reputation under the name of good will? But we must adequately forbid the capitalization of mere monopolistic power. Whatever the final decision may be as to the best basis of capitalization, no one questions that publicity in connection with promotion and the organization of corporations is the best general remedy for the evils of overcapitalization.

Price Policy of Combinations

4. Much also has been learned regarding the effects of the giant corporations upon various phases of business.

(a) The investigations of the Industrial Commission and of the Bureau of Corporations seem to have made it clear that very many of the claims of the great corporations that they have lowered prices on account of the savings which they have

been able to effect are not true. While it may be granted that they have often had the power to lower prices, in many instances they have also had the power to raise them, and especially during the times of most active trust organization, say from 1897 to 1902, the result of the organization of a great combination was in many instances to increase rather than to lower prices. It is true that in many instances it was claimed that the competition beforehand was so keen that all the members of the combination were losing money, and that the increase in price was merely enough to offset losses. Doubtless certain instances of this kind may be found, but when combinations have paid dividends of 40 per cent or 50 per cent, or even when they have paid dividends of only 5 per cent and 6 per cent on stock, three-quarters of which at least was water, and have increased prices, there seems no reason to question that they have been exercising unjust monopolistic power. On the other hand—let us be just—there can be no doubt that the combinations at times have tended to steady prices, and that in times of exceptional demand, when under the ordinary competitive system prices would have increased to an unusual degree, the great combination holding a dominant position in the market has insisted upon keeping prices steady and under the circumstances, reasonably low. On the whole, the most conservative of these great organizations are showing more inclination to be conservative in the use of power, and to hold prices steady. Here again it has been found repeatedly that whenever, either through governmental action or through a policy deliberately adopted by the corporation itself, there has been full publicity regarding the affairs of the corporation, prices have been kept much more certainly within reasonable limits.

There still remains the question of the price offered to foreign purchasers as compared with those at home. The principle has now been generally recognized by all careful thinkers on the subject, as the result of much discussion, that at times a small surplus stock or a stock which has remained on hand until there is danger of its becoming unsaleable may, without disadvantage to anyone, be unloaded at low rates abroad, just as we have clearing sales in all our great business houses from

time to time. While some of the corporation managers are ready to defend the practice of regularly selling abroad at lower prices than at home, on the ground that this is the only way to get the foreign market, and that the sale of these extra goods produces a steadier demand for labor at good wages, this point would not be generally conceded. In fact, it seems probable that this policy could not be carried out without the influence of a tariff unduly protective.

Combinations and Labor Unions Not Hostile

(b) The fear which the laboring classes, especially as represented by the great trades unions, formerly felt regarding the great corporations seems largely to have passed. They now realize, as the result of experience, that their unions are strong enough to cope on fairly even terms with the stronger combinations, and more and more it seems to be settled policy on the part of both unions and combinations to make trade agreements and settle their disputes on terms of equality. Certain governmental investigations seem to show that the result of the combinations has not been on the whole to lower wages. It seems probable that the wage earners of the higher classes and those with the lowest wages have both increased relatively in number, while those with low average wages seem on the whole to have lessened their number. The trade unions, however, seem steadily to be becoming capable of fighting successfully the cause of the wage earners, even against the greater combinations. On the other hand, from the point of view of the public, the danger of a combination between the corporation on the one hand and the laborers on the other seems not to be lessening, but rather to be on the increase. The corporations can, of course, increase wages if they can make the public pay for this increase in higher prices.

(c) The fear that all industry will be so dominated by the trusts that the ambitious individual with small capital will have no opportunity of directing business, and that therefore personal initiative in the business community will be greatly weakened, seems likewise to have passed. It has been recognized that even in the great corporations there is plenty of opportunity, as heads

of departments, to develop original views, which will be well paid for. Of still greater consequence is the recognition of the undoubted fact that the lines of industry which are adapted for combinations on a great scale are, relatively speaking, only a minor percentage of the total industrial interests of the country.

5. The experience of the last eight years has thrown much light on the question of remedies for the evils of the trusts. Many experiments have been made, and there seems now a reasonable basis for some fairly well established general conditions.

Supremacy of Law Vindicated

(a) In the first place, the supremacy of law has been clearly established. Formerly many seemed to question whether the corporation would not so dominate our governments that no restrictive laws would be effective. Fortunately, in both state and nation, men have been found who themselves possessed the dominating quality to a remarkable degree, and who to strength of will have joined integrity of character. It may be that some of our laws have been unwise, though, too, some of them have been wise, but in either event the dominating power of government over corporation has been clearly established. Men no longer fear the corporations. Now, therefore, their good and evil qualities may be discussed on their merits, and men need no longer in fear strike out blindly to destroy all agreements for joint action regardless of whether such agreements are good or evil.

Destructive Laws Harmful

(b) We have had many laws merely destructive in their nature. Experience shows, first, that these laws have not been generally and impartially enforced. Had they been so enforced in some instances practically every trade unionist, every member of a grocers' association, even every clerk or salesman who agreed to devote his business energies solely to the interests of his employer during the period of contract, would now be occupying a felon's cell. Usually such laws have been ignored in small places, and in reference to smaller combinations, and have been enforced only against some of the larger, although quite

possibly in some instances at least, against some of the more grasping and unscrupulous of the combinations. But even when these laws have been enforced they have at times led to higher prices for the consumers and in other instances, although effective in form, they have been non-effective in fact. Though the corporations have nominally been dissolved, practically their members have worked together as efficiently as before. It may indeed be said that this exaggerated attack upon agreements of all kinds, reasonable and unreasonable, has been one factor, perhaps the most prominent factor, in driving together into a rigid, single organization establishments that without this pressure of an unwise law would have remained in great part competitive, although acting under agreements in certain particulars. People who complain most loudly against the concentration of our railways and the growth of our giant corporations have largely to thank the baleful influence of destructive legislation.

Efficacy of Regulation Established

(c) The situation is far different as regards our regulative legislation. First, in both state and nation, we have secured in many instances a goodly degree of publicity regarding the work of corporations and this publicity has had a most decided effect in the direction of control. No sooner had the Bureau of Corporations exposed the unjust discriminations in rates in connection with the transportation of petroleum, than the unjust rates throughout large sections of the country were immediately changed. Even where there was no reason for believing them technically illegal, it was sufficient that they appeared unjust. Likewise the investigations of our public utilities commissions are having a similar effect on both capitalization and rates and much more in the same direction is still to be expected. We have just begun this form of control, of our public service corporations. There can be little question that an extension of this system will prove still more fruitful.

Probable Developments in Government Control

But we shall yet go further; under our new laws, the Interstate Commerce Commission is showing clearly the conditions

of the railroads, and is studying with far better opportunities the whole question of the cost of traffic and the reasonableness of rates. With the power which it now possesses of prescribing methods of bookkeeping and of constant supervision of the work of the roads, there need be no fear that should occasion arise, the power which the Commission has of fixing rates will be unjustly exercised. The presumption is that with the public in possession of the facts, presented in such a way that everyone may judge of the reasonableness of the railways' actions, these actions will probably be reasonable with little direct exercise of power on the part of the commission. The great manufacturing corporations are unfortunately not yet under so rigid control. The power, however, now exists of securing information and only a short time will be needed to give the public the facts regarding them. Is it not time that we go further and bring these great corporations under control similar to that exercised over the railways, prescribing in certain instances where their work is clearly interstate in its nature, a federal supervision which shall extend to methods of accounting and publicity in all matters of general public interest? This control may be secured either by a federal incorporation or by a federal license system, or by other means which may be devised. The essential point is that the government, and so far as seems wise, the public, shall know just what is done and shall have the power to control. And with this knowledge and control should there not likewise be joined as in the case of the railways, greater liberty of action so long as that action is reasonable? Surely, now the people have learned their power, so that they need not, themselves unreasonable, forbid reasonable action on the part of either railroads or corporations, but, holding in their hands the full power to check all unreasonable acts, give to corporations the right to make agreements which are reasonable and in the interests of the public.

Report of the Commissioner of Corporations. 1904. pp. 37-46; 61-3.

Corporation Law

The greater portion of business is transacted under the corporate form. It is obvious that the corporate form is the result of economic necessity, and that its present predominance will inevitably tend to increase.

Historical development of corporation law.—The need of essential reform in corporation law is admitted. Compared with other branches of law, corporation law is relatively new and untried—an experiment only just begun—while general business laws have passed through a long process of evolution. Its development has been abnormally rapid in some directions by imperative economic forces. In the haste of its creation it has been molded disproportionately by special interests, has grown extensively in special directions, and has not taken the form necessary to adapt it permanently for the proper protection of all the interests involved.

A study of the present body of corporation law shows the impress of the forces that have shaped it. First in prominence is the force represented by the masters of industry, the interests that are peculiarly connected with production, transportation, and exchange. Second, the purely financial interests as distinguished from production, in which class the organizer or promoter, so called, is conspicuous. Third, the creditor class, whose interest is in the security for loans or credit; and in somewhat similar position those stockholders who under present forms of combination, by preference or other device, have taken stock in exchange for property, and, in effect, consider themselves creditors rather than responsible owners of corporate stock. Fourth, the labor interests, and finally, the state as a taxing body and, to a very limited extent, as a guardian of public welfare. The interests of the consumer have so far had very little effect upon legislation of this sort.

In brief, the evolution of corporation law, as regards the properly balanced interests of the entire community, has been accidental rather than designed.

Fundamental theory of corporation law.—The law of corporations is based upon the establishment of a *form* of doing business; *i. e.*, the creation of an artificial entity, the conferring upon it of such powers as are necessary to give it proper business efficiency, while placing upon it such restrictions as will properly safeguard the interests of those peculiarly concerned in the corporation, as well as the public.

Peculiar characteristics resulting in peculiar evils.—A study of corporation law makes it clear that many of the existing evils of commercial conditions are directly due to certain features of corporation law peculiarly characteristic of the corporate form. The peculiarities may be summarized as follows:

(*a*) Legal immortality, or permanence of succession.
(*b*) Impersonal nature.
(*c*) Divisibility of interest by creation of stock.
(*d*) Limited liability.
(*e*) Artificial character; existence by act of the state.

Of these features the divisibility of interest and limited liability have far-reaching effects on commercial conditions, as follows:

Divisibility of interest: This is of primary importance. It results in majority rule; allows the abuse of minority interests; greatly reduces, and often eliminates, the sense of personal responsibility on the part of the managers; allows the exploiting of one company for the benefit of another; permits divergent and clashing interests within the company, by the creation, of special classes of stock; in connection with the limitation of liability it has brought into existence the small investor, he who has no accurate source of information, and whose necessary ignorance of business affairs is a standing temptation to "insiders"; permits the creation of stock and its use as a sort of currency; taken in connection also with the transferability of stock interests, it allows speculative manipulation; creates great practical confusion in the incidence of taxation.

Limited liability: This renders possible very large enterprises; encourages over-capitalization; taken in connection with divisibility of interest, reduces greatly, and often destroys, the interest of the managers in the success of the business and their

feeling of personal responsibility therefor, and affects greatly the moral factor in business management; allows extreme concentration of commercial power; reduces the security of creditors.

Ground for governmental regulation.—Governmental action having created the artificial corporate form with the above outlined peculiar characteristics, it is logical and necessary that governmental regulation of corporations should be much more stringent and detailed than the regulation of individual business. The concentration of business that has resulted from the use of the corporate form has produced entities that are almost equal in power to the state itself; that can meet the state on equal terms and influence it accordingly. By their size and legal permanence and their peculiar privileges they have crossed the line that divides private from public interests and their operations affect the public in much the same manner as the operations of government.

The great reduction of personal responsibility that has followed the corporate form, the divisibility of stock interests, and the separation of the laborer, stockholder, and creditor from contact with and control of the instruments of industry, has left a very large gap to be filled by government control, and has left more or less unprotected various important interests which must have the supervision and intervention of the state for the following purposes:

(a) To protect property rights in corporations held by those now unable to protect themselves by reason of lack of information or power.

(b) To protect those dealing with corporations as employees, creditors, or consumers.

(c) To protect the public from the abuse of great economic power coupled with little personal responsibility.

The economic powers of the government and of public officers are checked by a corresponding publicity and responsibility to the voters, while the economic powers of great corporations, although often governmental in their size and scope, have no such publicity or responsibility.

(d) To protect the government itself from the pressure of great commercial and financial powers directed upon it for the attainment of purely private ends.

Present System of Incorporation by States

Investigation of the state corporation laws has not been completed, but enough facts have been gathered to make possible a number of general conclusions as to this system. Substantially all the corporations of to-day are the creatures of the different states. This is so to such an extent that for all practical purposes it is proper to say that the corporate business of the country is carried on under the "state system."

The present situation of corporation law may be summed up roughly by saying that its diversity is such that in operation it amounts to anarchy. The states which by reason of their commercial activity are important differ very widely in the principles upon which their corporation legislation is based.

This situation, taken in connection with the principle of the comity of states, has had a singular and far-reaching effect on commercial conditions. This principle of comity has had the practical result of giving to the organizers of a proposed corporation the choice of all the corporation laws of the various states. Many such organizers represent one of the peculiar interests above referred to, namely, that of the financial or speculative type. Each state naturally desires, chiefly for the purpose of revenue, to attract incorporation to itself by lax corporation laws. The ground has been cut from under the feet of objectors to such laws by the unanswerable proposition that if incorporators or organizers were not accommodated in the given state they could incorporate in a more complacent state and easily come back to the first state to do business. The logical result has been an inevitable tendency of state legislation toward the lowest level of lax regulation and of extreme favor toward this special class of incorporators, regardless of the interests of the other classes properly concerned.

A further peculiar phenomenon also arises—that, as to the vast majority of business done, the corporation doing it is a *foreign* corporation. The ordinary large corporation does only a small proportion of its entire business in the state which chartered it. All the rest of its business it does as a foreign corporation, and under the peculiar conditions applicable thereto.

This is largely the natural result of subjecting concerns whose area of operations covers many states to the legal conditions imposed by *one* out of those many states. In other words, matters which rightly affect the *whole* are, to a certain extent, directed and shaped by a *small part* of the community.

The net result of this state system is thoroughly vicious. In the bidding of state against state for corporation revenue, only one of the numerous interests involved in corporate business is regarded. The proper relation of the corporation to the state is almost wholly lost sight of in "broad" corporation laws. Corporations themselves are hampered by the "foreign corporation" relation which they must hold toward most of their business. Constant change and instability of law is inevitable, and finally, in the struggle for preferences, privileges, and discriminations, the two contestants, to-wit, the corporation which seeks and the state which should withhold, are unequally balanced, and upon the wisdom and patriotism of a single state is placed the pressure of forces that are national in their power.

Anti-Trust Laws

A careful compilation and tabular summary has been made of all the federal and state "anti-trust" legislation. The word "anti-trust" in this connection has of necessity been loosely used This legislation can be divided into two classes of subject-matter, the one which is aimed at the prohibition of monopoly and restraint of trade, and which is more properly "anti-trust," and the other, which is aimed at improper rebates, discrimination, and unfair competition, and which has no necessary connection with combinations.

The theory of the first class of "anti-trust" legislation is the prevention of monopoly and the maintenance of a condition of competition.

Taken as a whole, this legislation (with a few marked exceptions) has been singularly futile. It seems likely that the reason for its failure is due to two facts, (a) that it is an attempt to stop the operation of strictly economic law by statutory enactment, and (b) the attempt to maintain a state of competition by prohibiting all combination, reasonable or unreasonable, is wrong in principle.

Apparently the only exceptions to this conclusion lie in the case of public-service corporations which are, by their nature, largely agents of the state, and exercise powers not granted to the ordinary corporation or individual.

Unfair-Competition Laws

The second class of legislation, usually a part of "anti-trust" laws, but having no necessary connection with combinations or trusts, is that which prohibits rebates, discriminations, and unfair competition. This legislation is based on an entirely different principle and is fundamentally correct. It is aimed not at the restraint of combination as such, or the maintenance of competition, but at regulating the *methods* of competition. It recognizes the irresistible tendency toward combination, and its purposes are to make certain that combination is reached only through just, fair, and proper means. Recognizing that the tendency to combine can not be stopped by statute, its object is to see that this process shall be attended with as little injustice as may be, and to this extent is correct in theory.

Tax Laws

Other general laws affecting corporate business are state tax laws, which are at present in a state of great confusion, based upon wrong or conflicting principles, resulting frequently either in double taxation or in total escape from taxation, and being often so obscure and complex as to defy interpretation, even by the state officials charged with their execution.

Miscellaneous Laws

A further class includes the general and miscellaneous legislation, instances of which are laws establishing rate-fixing commissions, "factory acts," general forms of business, etc., and a large class of legislation that is based upon the police power.

Comparative Efficiency of Various Classes of Statutes

While this study of the laws affecting corporations makes it apparent that many of the evils of the present situation have been created by statute and can be remedied by statute, yet it is necessary to recognize frankly the limits within which statute law can affect economic conditions, and to admit that there is a

very large area of business within which legislation is not only inefficient but productive of positive evil, however well intended. A review of the history of legislation on economic questions seems to show two classes of such statutes, the one effective and the other the reverse. Examples of the first are "factory acts," compulsory education, forms of business, regulation of corporate organization and management, safety appliances, prevention of fraud, etc., all of which have worked well. Examples of the other class are usury laws, absolute regulation of prices, anti-trust laws as heretofore explained, and anti-speculation laws, all of which have been essentially unenforceable (with some marked exceptions) and have, in the case of the usury laws and regulation of prices, actually accomplished results the reverse of those intended.

In dealing with the remedial force of statutes, it must be remembered that the law is merely, in the final analysis, a crystallization of public opinion, and a statute which too far precedes or diverges from public opinion will be ineffective. The use of the two forces must therefore proceed together.

Furthermore, it is necessary to consider the varying degrees of efficiency of given laws as dependent upon their form. Certain statutes are easily enforced—are practically self-enforcing—and owe their efficiency merely to their form, while others directed to the same end are unenforceable. The most important reason for this difference probably lies in the "sanction" of the given act—i. e., whether the impelling force thereof is a criminal penalty or a private right of the individual. It may be stated conclusively, as a general rule, that that statute which relies for its enforcement upon the interest of private individuals will be much more effective than that which is based purely upon a criminal penalty. This distinction has a very important bearing upon the form of corporation law.

Constitutional Powers of Congress Over Corporate Business

The federal powers which are available to meet the conditions above outlined and to carry out the purposes above indicated are based almost wholly on the "Commerce Clause" of the Constitution, as follows:

Article 1, section 8. "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Subordinate powers which may be sometimes available for the same purposes are the power to establish post-offices and post-roads, to lay and collect taxes, etc., and to coin money and regulate the value thereof.

It may be considered as established that under these powers Congress may—

(1) Create corporations as a means of regulating interstate commerce.

(2) Give to such corporations the power to engage in interstate or foreign commerce.

(3) Prohibit any other corporations or individuals from engaging in the same.

(4) As a condition precedent to the grant of such corporate powers, lay any restrictions it chooses upon the organization, conduct, or management of such corporation.

(5) Tax interstate commerce at will and the instrumentalities and corporations engaged therein.

(6) Provide regulations for the carrying on of interstate commerce generally and in such local affairs as are now left to the states in the "silence of Congress" under the principle established in Cooley *v.* Port Wardens (12 How., 299), and in the carrying out of such powers it may use any or all means "which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution."

Furthermore, the individual states are restrained by the Federal Constitution from laying any burdens upon interstate or foreign commerce or from regulating or controlling the same, except in the case of local matters and in the "silence of Congress" aforesaid. This does not exclude the rights of the states to exercise their ordinary police power as applied to the persons engaged in, or the instrumentalities used for, interstate commerce so long as the exercise of such powers does not constitute a direct interference with that commerce itself, but is applied only indirectly, and is appropriate for the general purposes of local police regulation.

As a corollary from the above, the states can lay no tax upon interstate commerce as such, or upon the subject-matter thereof as such, nor can any state discriminate against interstate commerce as such, nor can it lay any burdens upon the exercise of a constitutional federal franchise or impose taxes thereon, except by direct permission of Congress.

Briefly, as to interstate and foreign commerce, the United States is one country, one legislative area, and when federal regulation of such commerce enters any given state for the purpose of operating on such commerce it enters it not as a foreign territory but as a part of its own jurisdiction.

Remedial Legislation Suggested by the Above-Described Work of the Bureau

1. ADDITIONAL STATE ACTION

This is wholly inadequate. The same objections apply to this suggestion on general principles as have already been made to the present condition of state corporation laws. There is now a strong positive motive leading the state legislatures toward lax and improper corporation laws, and even if all the states were actuated by most correct motives, nevertheless, it is obviously impossible that forty-five different jurisdictions should agree on anything like a uniform system in so important a matter as corporation law.

2. DELEGATION BY THE UNITED STATES TO THE INDIVIDUAL STATES OF THE CONTROL OF INTERSTATE COMMERCE

Two objections, each conclusive in itself, can be made to this suggestion:

(a) Such action is believed to be unconstitutional. Congress has no power to divest itself of its constitutional powers or to delegate the same to any other legislative body.

(b) Even supposing that this could be legally done, the results would be open to the same objections as have been referred to just above.

3. FEDERAL INCORPORATION

This is one of the two more practical methods suggested. It assumes the passage by Congress of a complete corporation law

with the compulsory requirement that all corporations engaged in interstate commerce shall be organized under such law. It contemplates that such corporation law shall be so drawn as to embody all the necessary and proper features to provide an efficient form for the carrying on of corporate business, and at the same time to safeguard properly all the interests involved therein. Such a law should have three principal features.

(a) The creation by Congress of corporations with power to engage in interstate commerce.

(b) The prohibition upon all other corporations from engaging in such commerce.

(c) The granting to such federal corporations of the right to *manufacture* and *produce* within the several states.

The first two powers are subject to no vital legal objections, nor can a state make any essential opposition to them even by the right of taxation. The chief difficulty in the federal corporation law, as above indicated, arises in connection with the third of the foregoing essential features, to-wit, the question: Can Congress give to an "interstate commerce corporation" the additional power to *produce* or *manufacture* in any state so that that grant of power shall be valid as against the states or individuals? In the absence of direct judicial decision on this point, it is impossible now to determine this question conclusively, and the answer to it must be made by reasoning from inference and on general principles.

Furthermore, there would be the practical difficulty of giving to the states power of taxation over such corporations in such manner as to permit the states to obtain the amount of revenue which they now collect from corporations domestic and foreign. The suggestion that the federal incorporation law be made optional fails to meet the difficulties, for the reason that it would not be taken advantage of unless its conditions were more satisfactory to the corporations, and especially their promoters, than offered by existing state laws; and if such were the conditions, there would be no benefit to the public and no remedy of existing evils.

4. FEDERAL FRANCHISE OR LICENSE SYSTEM FOR INTERSTATE COMMERCE

The principal features of such a system would be:

(a) The granting of a federal franchise or license to engage in interstate commerce.

(b) The imposition of all necessary requirements as to corporate organization and management as a condition precedent to the grant of such franchise or license.

(c) The requirement of such reports and returns as may be desired, as a condition of the retention of such franchise or license.

(d) The prohibition of all corporations and corporate agencies from engaging in interstate and foreign commerce without such federal franchise or license.

(e) The full protection of the grantees of such franchise or license who obey the laws applicable thereto.

(f) The right to refuse or withdraw such franchise or license in case of violation of law, with appropriate right of judicial appeal to prevent the abuse of power by the administrative officer.

No fundamental legal difficulty can be discovered in this plan. Congress would grant to corporations that meet the proper conditions power to engage in interstate commerce; would fix the conditions under which their business should be done in such manner as to remedy the present defects in the state corporation law, and would require all corporations and corporate agencies engaged in interstate commerce to make returns to a federal bureau, showing the amount and nature of the business done, and such other facts as may be desired. Furthermore, this plan obviates the difficulty regarding state taxation.

Inasmuch as practically all the important corporations of the present time are engaged in interstate commerce, and as the United States has the right to fix conditions to this license to engage in interstate commerce, this system would enable the federal government to reform the present condition of corporate business in all its important features.

Federal Franchise System v. Federal Incorporation

The essence of the difference between these two systems lies in the question whether corporations doing interstate commerce shall retain state franchises or not.

The *franchise system* consists practically in conferring on state corporations a federal franchise to do interstate commerce under certain conditions in addition to their state franchises. The state corporate entity is retained, and all federal regulation of such corporations would have to be within the limits imposed by the fact of state incorporation.

Federal incorporation means the complete abandonment of the state corporate entity and the substitution of a federal entity therefor.

The two main questions raised by a comparison of these two systems are:

(*a*) The respective practicability thereof. This will be considered later.

(*b*) The respectively different effect these systems would have on the relations between the state and the United States as to such corporations, especially as to the legal questions that would be raised by the two systems.

Quite diverse sets of legal questions are raised by the different systems.

LEGAL QUESTIONS RAISED

Legal questions under federal incorporation.—(*a*) Can the United States grant a strictly manufacturing or producing franchise?

(*b*) Can the United States charter a company at all merely to engage in interstate commerce, and as a means of regulating interstate commerce?

(*c*) How far would such companies be subject to state police laws?

(*d*) How far to state tax laws?

(*e*) How far could the United States by permissive laws give the states police, taxation or other powers over such companies?

(*f*) What prohibitive powers over such companies or their operations, if any, could be exerted by the states in defiance of

United States laws—i. e., how far would states retain absolute power to burden or restrict the operations of such companies?

(*g*) What portions of the organization or conduct of such companies would the United States be without constitutional power to regulate or provide for?

Legal questions under franchise system.—This system presents the very common case of corporate entities created by one authority and regulated by another in certain features, a condition that occurs regularly under the present "state system." The dual jurisdiction is the prominent feature in this system and upon this feature would be based most of its difficulties and objections.

Neither system is or can be wholly free from the dual jurisdiction. But the franchise system emphasizes this, while the federal incorporation system reduces it to a minimum.

(*a*) Can a state refuse to allow one of its corporations to accept a federal franchise?

(*b*) Can a state prohibit or a private individual prevent a foreign corporation with a federal franchise from manufacturing or doing a domestic business in the state?

(*c*) Are all state corporation laws broad enough in their permissive principles to allow their corporations to comply thereunder with the necessary conditions for corporate improvement that must be required by a United States license law? Can the necessary reorganization of corporations be accomplished under all the state laws? If not, what states would be omitted and what would be the practical result? Would it be to compel the states to bring their corporation laws to a uniform standard?

(*d*) Can the United States attach to the right to do interstate commerce the conditions under which a state corporation shall carry on its purely domestic business; and if so, how far can it thus regulate purely domestic business?

(*e*) How far can the United States thus extend its police power over such corporations, and what would be the irreducible minimum of state police power, if any?

(*f*) Questions of taxation: Apparently few especially new legal questions would be raised here by this system.

(*g*) How far would the desired national uniformity of corporate law and conditions be secured under this system?

General.—One question under both systems is the possibility of evasion presented by the use of an individual selling or purchasing agent for corporations, so that all interstate commerce, per se, would be carried on outside the corporate form.

COMPARISON IN DETAIL OF ADVANTAGES AND OBJECTIONS

Federal incorporation—Advantages.—The one merit of the federal-incorporation plan is that it is based upon a clean-cut legal theory, that it brings the entire matter of interstate commerce under one jurisdiction, and reduces to a minimum the friction that must occur between federal and state authorities in the attempt on the part of the federal government to regulate interstate commerce. Federal corporations, being corporations of the federal government, are wholly under its control, and, except for the necessary local police jurisdiction, are wholly removed from the control of the states.

Objections.—Over against this distinct advantage, there are a number of very strong objections:

(*a*) The legal uncertainty, already indicated as to the validity of a federal *franchise to produce.*

(*b*) The drastic nature of the change that would be brought about by a compulsory federal incorporation law, and the intense opposition that would at once be aroused by the prospect that corporations of the federal government were to be placed in entire control of the most important part of commerce.

(*c*) The obvious reduction of state revenue from incorporation.

(*d*) The tremendous change toward centralization that such a system would produce. This is the most important objection, and is a very weighty one. It is hardly necessary to outline the vast far-reaching effects upon the entire nation that would be produced by such a fundamental change in our commercial system.

For these reasons, it is believed that the plan of compulsory federal incorporation is inadvisable.

Federal franchise—Advantages.—The advantages of the interstate-commerce-franchise plan are:

(*a*) Affording sufficient federal control to allow of uniformity and necessary improvement of the present body of corporation law.

(*b*) The legal nationalizing of a business system that is now commercially national.

(*c*) The offering of inducements to corporations to take advantage of such a plan for the reason that such a system would afford stability, uniformity, and, to the extent of their federal franchises, would render them exempt from state control.

(*d*) The preservation of the right of state corporate taxation.

Objections.—The objections to the franchise system for interstate commerce are as follows:

(*a*) This system would, while federal in its purpose and intent, have its foundation in state charters, and therefore the operations of the federal law for a given state would, to some extent, be confined within the limits of the incorporation laws of that state. The difficulty is not a serious one, as the limits of *possible* action in the various state incorporation laws are usually quite broad, and in most cases these limits would not hamper the operation of the federal system. Furthermore, there would be a salutary tendency on the part of the states to adapt their incorporation laws to the requirements of the federal act, and a general trend toward uniformity, even in state legislation, would probably thus result.

(*b*) This system also contemplates a division of responsibility for control of corporations between the federal government on the one hand and the state on the other. A certain amount of friction would thereby result, and, furthermore, any diffusion of responsibility in general tends to lessen the total amount of responsibility and to make it more difficult to determine the causes of any given abuse. Nevertheless, it must be remembered that the present state system is a much more extreme instance of this difficulty. Under that system it is a matter of daily occurrence that corporations created by one state are regulated by another. On this particular point, therefore, the proposed federal system would be less objectionable than the present state system.

(*c*) From a political standpoint there would be a certain amount of centralization of forces in corporate matters. The pressure now brought to bear by corporations almost exclusively on state legislatures would be partially transferred to Congress. This, however, is merely a transfer of such evils as may now exist and not an increase; and perhaps it may be fairly said that Congress, representing the power and public opinion of the whole people and responsible to the whole people, is better able to meet on equal terms those corporate influences whose business and power is also national in character than a state legislature, which represents only the power and public opinion of a single state.

(*d*) It is possible that under such a system it might be necessary to place considerable discretionary power in the hands of the bureau charged with the enforcement of the law. Opportunity might arise thereby for improper administration, but this would be guarded by the right of judicial appeal.

(*e*) A certain amount of interference with commerce and hindrance of the current of trade would inevitably result during the period of transition. It is submitted, however, that the net result of such interference would be less than under the present system.

(*f*) There would also be a number of difficulties of detail relating to the enforcement of the act, the subjects to which it shall apply, the methods of gaining information without unduly annoying business interests, and the various practical questions that arise in the enforcement of any new and fundamental legislation.

It is believed, however, that these objections are more apparent than real. Carefully drawn legislation, amended as experience may indicate and followed by a few years of judicial interpretation, would serve to define the limits of the respective jurisdictions, to establish the rights and duties under the new system, and to determine the working details thereof.

It is obvious that the bulk of the business of to-day has become national in its scope and in the interests involved, and whatever may be the inconveniences attending the change, it

seems necessary that present legal conditions must be altered to correspond with commercial conditions if the corporate business of the country is to be placed upon any satisfactory, permanent basis.

AFFIRMATIVE DISCUSSION

North American. 182: 123-32. January, 1906.

Plan for Regulating the Trusts. John F. Cronan.

The American people have had presented to them for solution many questions of great importance, including in their scope every phase of human endeavor; and it has been their good fortune, except in rare instances, to settle such questions, and to settle them rightly, through the influence of public opinion, crystallizing into law.

Of all these questions, excepting those relating to the severance from the Mother Country and the abolition of slavery, no one of such far-reaching importance, affecting all of the people, has ever occupied their attention, or has been more likely to lead to serious results, than the question of regulating the vast aggregations of capital in the form of trusts, which seek control of all the raw and finished products entering into the daily necessities of the people and into every manner of public utility by which the wants of the people are supplied.

When a comparatively small number of men, able to control unlimited capital through combinations under the seal of the state, are permitted so to conduct their business that the public suffer and every section and class of people are compelled to submit to their exactions, it is not surprising that the people have become aroused and demand relief. State after state has recorded its protest; and the President and Congress, heeding this warning, are struggling with the problem with a view to finding a solution just alike to the people and to the interests affected. But as yet no plan providing for the supervisory control which is essential to the public interest has been presented.

In order to arrive at a correct conclusion as to how this trust question must be dealt with, we should determine what are the evils from which the people suffer through the trusts.

The first and most important evil is overcapitalization.

The second is the unnecessary and unjust degree of protection afforded the trusts through the tariff.

The third is the failure of any substantial or uniform regulation by which the affairs of the corporation are made known in annual or more frequent reports.

The fourth is the lack of any legislation affording substantial protection in the way of supervising the power against discrimination or injustice, except by the cumbersome process under the Sherman act; while, at all stages of its corporate existence, in its dealings with the public, the trust is under the protection of the federal government to the moment of judicial decision declaring the trust a monopoly in restraint of trade.

There may be differences of opinion as to whether the order of classification here stated is correct from the standpoint of relative importance; but it is believed that the chief difficulty will be found to arise from the inflated and illegitimate valuation which, in the absence of supervisory control, is solely within the discretion of the promoters. The ability to fix the capitalization arbitrarily, and the necessity, once this value is fixed, to give it in the eyes of the public an actual value, necessitates the uprooting of competition and the enforcement of economies by reduction in the number and salaries of employees, and, lastly and perhaps most important, by reduction in the price of the raw material and increase in that of the manufactured article.

While the other evils in the above classification are of great importance, they are restricted in their general power to harm, as compared with the widespread injury which not only follows the creation and practical working of the combination, but in fact constitutes the real inducing motive and furnishes the temptation which leads to the merger or consolidation of interests by which the trust is created. The course here

outlined, if it would not prevent, would at least aid in controlling, the evil.

It is popularly asserted that the trusts are the creatures of the tariff, but this is not wholly true. Trusts which operate in protected articles are undoubtedly benefited, but many of the great trusts are not affected by the tariff. It should not be forgotten that the people have, at all times, under their own control the power to compel such a revision of the tariff as will remove any difficulty arising from the tariff; and though the allied power of wealth may be able to defer such revision, it is nevertheless in the power of the voters of this country to compel such revision of the tariff as may be necessary in the public interest.

In many quarters, it is asserted that the trusts are the result of an economic force, the result of natural laws, but it will be found on examination that this is not correct. The real force underlying the trusts is the desire for power and wealth which seeks to gratify itself through ability to control the raw and finished materials, whereby the market for the producer is limited while the price to the consumer is regulated.

The many business establishments which for years have flourished in this country could not be forced out of the hands of their former conservative controllers without some great and overwhelming inducement—that inducement was the power to capitalize at the will of the promoters of the trusts. So that, granting the force of the contention respecting the influence of the tariff, and assuming a revision on a just and fair basis, we are still without remedy to control the creation of the trusts. The conclusion seems inevitable that, if we are able to reach a basis as to the real inducement which leads to their formation and find it is due to the failure of existing laws to exercise that supervision which would prevent the exploiters from fixing a capital at their discretion, we shall be able to strike at once at the root of the evil by compelling submission, in the first instance, to an authority which will fix the value of the corporation, or business interests to be merged, at their true value. So that if the corporation or business sought to be

merged into the trust found that no substantial advantage beyond the actual value was to be obtained by turning its corporation or property over, there would be ordinarily no temptation to do so.

To make the application, let us consider what would be likely to be the answer of the president of a well-conducted and paying corporation who was invited to turn over his corporation, with others in like business, to form the trust, solely upon receiving the value thereof. As a rule, there would be but one answer—a refusal. Threats of destruction by competition might be made, difficulties there might be to face, but these are the incidents of business and usually must be met under all circumstances. The promoters of a trust will find grave, if not insurmountable, difficulties in forcing a merger or consolidation of corporate interests, when the power to fix the capital applicable to the payment for the property to be acquired is taken from the individuals forming the trust, and placed in the hands of honest and competent men acting as a commission with full power to decide the true value of the property.

Let us consider from what source this supervisory power should come. The wide differences in the corporation laws in the various states preclude any hope of relief from that source in the absence of a constitutional amendment, and it is extremely doubtful, in view of the revenue which the various states receive from corporations, if any effective amendment to the Constitution could be adopted. The only hope of dealing with the problem, therefore, is with the federal government.

In taking over a corporation, but little difficulty would be experienced in determining the value of the tangible, active or live assets of the business. The difficulty comes in determining the value of the good-will, trade-marks, patents, etc. In the absence of supervisory power, the valuation of the latter elements of property is left wholly to the promoters of the enterprise. There can be urged no ground of objection to a corporation whose capitalization is restricted by reasonable and fair limitations under proper control or regulation. That is, a

corporation which is honestly capitalized issues its certificates of stock, and these to the extent of the issue represent the true value of the property of the corporation. The state receives its tribute in taxation, the stockholders as a rule receive a fair return, and there is no reason for forced economies in dealing with the employees or arbitrary inflation of prices, in order to earn a dividend.

But when, in the absence of regulation, the capital has been inflated to a point many times in excess of the true value of the assets of the corporation, it is obvious that, to enable this artificial capital to net the promoters a substantial return, there must be manipulation of the price at which the products can be bought and sold, operating unjustly to the producer and consumer, and the forcing of economies resulting in many instances in the loss of employees who have been sacrificed to pave the way for dividends to give the inflated stock a market value.

This, however, is not the limit of the promoters' enterprise. They go beyond the methods here described. In the ordinary case of the shares of common carriers or quasi-public corporations offered to the public through the medium of the Stock Exchange, certain regulations are prescribed requiring a sworn statement of the assets of the corporation, its earnings, and the general scope of the business, sufficient to enable a man to form a judgment of the value of the property which forms the basis of the market price from time to time. But in reference to many of these large industrial corporations a departure was made by the Stock Exchange; these corporations being unable or unwilling to comply under oath with the requirements showing the actual value of the property and its true condition, were permitted to have their securities placed in the unlisted department of the Exchange. The real reason for declining to submit to the Stock Exchange requirements was an unwillingness to expose the inflated value placed upon their intangible assets and in many cases upon their live assets, and thus hide from the public the true value, affording an opportunity to the "insiders" to juggle with their securities and make and unmake the market

price thereof. In this way, they are afforded all the advantages of the Stock Exchange, while escaping the regulations it has established for the protection of the public. Had the Stock Exchange taken a heroic stand, subordinated commissions to principle and refused its privilege of selling securities to such corporations as were unwilling to place true information as to their condition within access of the public and comply with the conditions imposed upon honest and well regulated corporations, they would have been unable to foist their securities upon the public, and one phase of the evil complained of would have been remedied.

This branch of the matter is referred to because of the claim that the remedy lies in greater publicity in corporation matters. While this would, doubtless, afford some protection to investors and give some knowledge of the inner working of the combination, it is believed to be altogether too narrow a remedy to affect substantially the conditions which are at the foundation of the evil.

The effect of the recent suggestion of Commissioner Garfield as to a federal license for corporations doing an interstate business would be to put the federal government in closer touch with the corporations, and afford the government an opportunity to deal in many respects more effectively with the corporations than at present. But the trusts are creatures of the several states, and the plan proposed by Mr. Garfield would in no manner prevent their formation, although it might be helpful in removing the difficulties which their existence creates. His suggestion has provoked some discussion from corporation attorneys of high standing and from trust officials. They apparently would be willing to submit to federal regulation in accordance, for example, with the suggestion of Mr. James B. Dill, if the problem could be worked out by the passage of a law permitting corporations to be chartered by the federal government, under the belief that their business could be thereby so regulated as to afford full measure of protection.

National Conference on Trusts and Combinations, Proceedings. 1907. pp. 100-7.

Governmental Regulation. Theodore Marburg.

Since the first Chicago conference on trusts we have had some years of practical experience and experiment accompanied by academic discussion. The present conference is in a position to consider this data and elicit from it certain governing principles—principles in the light of which present problems may stand out more clearly and future developments, as they arise, may drop more readily into place and reveal their true relations and significance. The value of the corporate form for big enterprises is so fully realized by everybody that it need not be dwelt upon. We may likewise take it as an accepted fact that what is known as the industrial trust has so many advantages from the standpoint of economy of production that it is more desirable to regulate it than to ruin it. Again, we have come to accept the public service corporation as in its nature a monopoly, i. e., operating in a field and under conditions where it is very difficult to establish other than temporary competition.

Evils of Combinations

Our first step, then, is to get clearly in mind the evils connected with these otherwise useful institutions. The corporate form itself makes possible the evils of dishonest promotion, including over-capitalization, misleading financial statements and dishonest management. The magnitude of the interests that can be assembled in corporate form invites corruption of the legislatures by reason of the prize at stake. Abuses common alike to the public service corporation and the industrial trust are: discrimination and excessive gains made possible by monopoly. It is the element of monopoly likewise which permits the abuses peculiar to each; to the public service corporation inadequate service and lack of progress, and to the industrial trust unfair methods, inferior quality of product and depressing the price of the raw material.

The evils that characterize the corporate form, over-capitalization, etc., may be dealt with by requiring that capitalization be limited to actual value paid in and by publicity. We have examples of the successful operation of such laws.

Maintain Industrial "Open Door"

Discrimination on the part of the railroads, being severely penalized under the present laws, must soon disappear. Its practice by industrial trusts is the principal weapon in their armory of monopoly. If discrimination be suppressed, the remaining abuses of trusts will largely disappear; the abuse of excessive price, unfair methods (such as binding a prospective purchaser to deal only with the trust) inferior quality of product and depressing the price of raw material. Compelling the trusts by law to sell at one price to all comers at the factory door, just as railroads are compelled to serve the public to-day at uniform charges, would effectually stop discrimination. It would re-establish the industrial "open door" through which the potential competitor may enter. Monopoly resting on government favor, such as a patent or franchise, and monopoly intrenched in control of the supply of the raw material, would alone remain to be dealt with. All others could maintain themselves only as "monopolies of excellence." The chief aim of legislation designed to cure the evils of industrial trusts should, therefore, be to maintain the industrial "open door," to safeguard the potential competitor.

To Obtain Better Service

In inadequate service lies the chief shortcomings of the public service corporation. Improvement in the quality of the service should be the main object of legislation affecting them. The questions of the cost of the service and the public revenue should both be subordinated to it. Included in the topic of inadequate service is the serious question of the partial crippling, or entire stoppage, of the service by strikes. If it be difficult or undesirable to adopt compulsory arbitration as a remedy, we should at least apply to public service corpora-

tions compulsory investigation, which has been shown to promote so materially the settlement of disputes.

In seeking from the public service corporation an adequate return for the valuable privileges granted, it is important to avoid any system of taxation which will discourage enterprise. Among the many plans followed, one which has commended itself for some years to students of public questions, and is followed successfully in connection with such different institutions as the Imperial Bank of Germany and the elevated railways of Boston, is that under which profits above a given rate are divided equally by the public treasury and the corporation taxed. Under this plan ample incentive is left to enterprise, and the effect on the sovereign body is conservative, since it realizes that if the cost of the service be reduced by statute or decree, half the loss will fall on the public treasury.

Limits of Government Operation

When we come to the question of the means by which these ends may be attained, we find them differ widely, according to the problem present. If there is lack of progress in the conduct of the telegraph and express service, if inventions are suppressed, if the service is poor and the charge excessive, why not government operation? The machinery is already provided in the existing post-office system. In country offices the postmaster himself, and in cities a subordinate, becomes the operator. For small packages in both town and country the postman is the expressman, and for more bulky packages the railroads are required to institute a system of collections and deliveries and quick service identical with the present express service. It would not be so difficult to install the telephone with automatic switchboards in the local post-office.

But the moment we attempt to dispose of other public service corporations in this summary way, we are confronted with an insuperable objection, the objection to adding their army of employes to the existing body of public servants. The

economic aspect of the question—that fact that government operation is apt to be more wasteful—is dwarfed in comparison with the political danger of adding 1,300,000 railway employes alone to the government service. And what about the street railways, with their 140,000 employes? Once transferred, it is likely that these growing services will continue to be operated by the nation or city. Abuses practiced by some other industry—such as the mining of coal—would precipitate a demand for its absorption by the state, and we would be saddled for all time with a swarming bureaucracy who would gradually come to look upon public office as an hereditary right to be handed on to their children, as in France and Germany to-day. Such a bureaucracy would sap the life of the Republic and constitute a menace to it.

What we require then, in the case of the majority of public service corporations, as well as of industrial trusts, is not absorption by the state, and not direct control of charges, but control of conduct, which embraces the matters of questionable practices and of the quality of the service. It remains to consider how best to effect this control of conduct.

National Control Essential

The separate states have proved themselves inadequate to the task. Improved communication has caused industry and commerce to leap state bounds and become national. It follows that they can be controlled successfully only by the federal and not by the state governments. Model incorporation laws in the few states in which they exist serve only to drive corporations elsewhere for a charter, which charter immediately privileges them to operate in every other state, including the home state. It is only by denying permission to do interstate commerce to corporations which fail to conform to definite federal requirements that the problem can be solved.

World's Work. 4: 2526-32. September, 1902.

Home of Trusts. S. McReynolds.

The industrial American, whether he desires to mine copper in Michigan, to exploit the Philippines or Porto Rico, to cut lumber in New Mexico, to operate a line of steamers on the Great Lakes, to manufacture steel products in Illinois, to buy furs in Alaska or to run a chain of restaurants in New York, goes to the little city of Trenton, New Jersey, for a charter. So also go the wolves of commerce with a view to profits on the Exchange rather than to legitimate earnings; so also the foxes and lynxes of trade, who plan the disposition of finely lithographed stock certificates and bonds for "development purposes" which are intimately associated with their own private purses.

The astounding proportions to which this business of charter-giving has grown is indicated by these figures from the official reports.

Year	No. Charters Granted	Filing Fees (Approximate)	Annual Franchise Tax
1896	834	$75,000	$707,430
1896	1,059	100,000	707,034
1898	1,103	150,000	830,689
1899	2,181	700,000	950,034
1900	1,987	400,000	1,494,587
1901	2,347	560,000	1,628,958

Even this table fails to give an adequate idea of the income to the state from this source, for the rate of taxation diminishes with the increase of capitalization, and the tendency in later years has been toward the consolidation of corporations that had been formerly chartered. For instance, the year 1901 showed an increase of eighteen per cent. over the previous year in the number of charters issued, while the total capitalization of the companies incorporated was in 1900 $1,296,897,585; and in 1901 $2,907,390,530—an increase of 125 per cent. The revenue derived from these corporations for filing fees and franchise

taxes alone (which is exclusive of all taxes on real and personal property) is already sixty percent of the total revenue of the state and bids fair in a few years at the present rate of increase to relieve the citizens of all state taxes. It has even been predicted as a possibility that an annual dividend may at some time be paid to the citizens of the state.

The corporation laws of New Jersey prove alluring because they appeal primarily to the promoters, the organizers and the ground-floor holders rather than to the mass of the investors who acquire their stock later. There are important exceptions to this sweeping inference, but on reading the Corporation Act one cannot fail to note that express provision is made for nearly every species of selfish manipulation and tyranny by the directorate and by larger holders.

The officials at Trenton are most strenuous in denying that the state has made laws with a view to inviting corporate business. They say that the legislature has simply on general principles attempted to frame a good corporation act, and that the corporation business has come merely as an incidental result. But on the floor of the legislature it has been freely admitted that the laws have been adapted especially to the needs of prospective incorporators with a view to fees and franchise taxes. Two or three members in the House lately referred by way of illustration to a recent amendment which was passed at the express instance of the United States Steel Corporation's promoters, which, it was said, threatened to go elsewhere for its charter if the law were not enacted, and as one of the members remarked, "It was such a big one, we didn't want to miss it." The amendment was to the effect that whereas a former regulation required the assent of two-thirds in interest of the stockholders in order to make alterations in the charter, etc., thereafter such action might be taken on the assent of two-thirds in interest of those present at the meeting. The steel interest feared that with a billion dollars of stock scattered world wide, it would be difficult to get two-thirds of it represented at any meeting.

That popular prejudice will always be appeased by the magnificent income which the state now derives from the licenses and fees of the corporations is quite doubtful. Evidently the time is coming when the great industries will be united and organized into fewer units. When that stage is reached, one of the most fruitful scources of income, viz., filing fees, will be materially reduced. Then New Jersey may cease to seek for corporation business. The legal rights of by far the larger part of the organized wealth of the country will then be in her hands subject to repeal at any time, for in order to avoid the effect of the Dartmouth College decision, the state has, by statute, reserved the right to repeal or amend her Corporation Act at any time. Then the cupidity which in the past has led her to pander to the trust magnates may become a weapon in the hands of demagogues. Thus the receipt of the state's income from such an unusual source rather than from taxes paid by private citizens may have its present advantages; but it may have its future dangers.

In the meantime it is not surprising that Delaware should become envious of the golden stream pouring into the treasury of New Jersey and take over bodily the latter's corporation act—except that, whereas New Jersey's tax is one-tenth of one per cent of all stock outstanding up to the sum of $3,000,000, Delaware's tax is one-twentieth of one per cent., and, whereas New Jersey assesses one-twentieth of one per cent. for all stock issues in excess of $3,000,000 and less than $5,000,000, Delaware demands but one-fortieth of one per cent. and so on thru the scale. But financiers are dubious of such sudden camp-meeting conversions and continue to go to New Jersey, whose hospitality is a tradition of so many years that they have little fear of a reversal of policy.

National Incorporation Laws for Trusts.

James B. Dill.

Introduction

I view with favor the enactment of a national incorporation act as distinguished from a national control of state-created corporations.

The country demands uniform corporate legislation, formulated upon the good of the nation, and not sectional legislation, state against state.

Such national law might be along the lines of the National Banking Act, not abridging the powers of the state to create local corporations, national in extent, the business of which relates to trade with foreign countries or between states.

Affording the protection of the national government against conflicting state legislation and local political enactments, and —what is equally important—enforcing well-considered regulations and wholesome restrictions incidental to national institutions, analogous to the provisions of the national banking system.

Whether or not the national government should by legislation eventually discourage the organization of state companies other than local, as in the case of state banks, is, perhaps, a matter for future consideration.

A national corporation act should be based upon the public demand for cleaner legislation and for purer politics premised upon the assumption that it is more feasible to obtain from the national body proper regulation and control than in and from various state legislatures, some of which are to-day engaged in a competitive warfare for revenue from corporations.

It is only necessary to suggest that proper control and proper restrictions, provisions for publicity and similar requirements, would be more readily maintained under a federal act, less subject to evasive acts, because a national bill would attract the attention of the nation and could not be passed with the secrecy and despatch of a state act.

These views invite a brief survey of the practical situation of to-day.

Trusts are a Force National

While the word "trust" has not become generic to the entent that is is defined by all alike, nevertheless, for the purposes of this discussion, one may be satisfied to accept that term as meaning a *corporate aggregation engaged in business* other than merely local, and *not confined in its operations* and scope *to* the *state* of its creation.

It is proper to include commercial combinations, financial aggregations and every organization, corporate or otherwise, which tends to concentration and consolidation of force.

With this definition I pass to the proposition that the trust, so-called, has advanced beyond the province of mere academic discussion.

The question of its origin and its growth must be regarded as a matter for the historian rather than an essential element of this discussion.

Whatever be the promoting or direct cause of combinations, industrial or financial, they have become, and to-day are, an integral element in the struggle of this nation for commercial supremacy.

Nor is this tendency to combination, to concentration, to the aggregation of power as yet at its height. Its progress will according to all indications be as great in the future as it has been during the last decade.

Discussion has been thus far based more upon conjecture than upon actual experience.

Not only Americans, but foreigners also, have begun to realize and to recognize the national force and the international power of this movement.

Viewing the subject on the one hand from the standpoint of undoubted advantage to the country, some are inclined to advocate the free passage of combinations throughout the United States and the doing away with legal limitations upon their progress and growth.

They urge the liberalization of our corporation laws, without regard to proper control and wholesome restrictions.

Having in mind, on the other hand, the potential dangers involved in the possession of power of any kind, others are inclined to advocate devoting the entirety of the legislative energy to the repression and suppression of the trust movement; their conviction being that the centralization and enlargment of power accompanying the formation of vast combinations must, unless brought under rigid restriction, present more than merely a menace to the well-being of the country.

The safe principle, however, is found in the statement that the "Trust Problem" is not the problem of abolishing industrial combinations, recognizing that they are a power national in extent and a necessary subject of federal jurisdiction.

The basis of discussion as to the legal control of combinations must be, not primarily utility, and secondarily control, but utilization and control standing *pari passu.*

A realization both of the utility and of the dangers is essential to an intelligent appreciation of the "Trust Problem."

The trusts of to-day are a force and a power national in extent.

National in extent in that their business extends not only throughout all of the original and acquired territory of this country, but is rapidly over-leaping the boundaries of our states and possessions, entering into foreign countries and making rapid inroads into foreign markets; and national in extent also in that their financial roots extend down and into every commonwealth and municipality of this country.

Investing stockholders of the so-called trusts and combinations are innumerable and widely scattered.

The list of stockholders of a single corporation contains over five thousand investors scattered throughout the United States.

One gives special emphasis to the term "investing stockholders" as showing the hold which these organizations have taken upon the people of this country; a safe-guarding, it is true, both for the country and for the corporation, but as well

a menace to the extent that an industrial panic would be felt also in many villages, towns and cities throughout the United States. And the destruction of the widow's mite represents more of personal suffering than the loss of a portion of a millionaire's riches.

It has been said, and with some accuracy, that the death of a financier controlling the policies of great industrial combinations, a man of the type of J. Pierpont Morgan, would more affect the industrial, financial and commercial interests of the United States than would the death of a president of the United States.

Be this as it may, it needs no demonstration to support the proposition that the trusts of to-day are a force national in extent, that they are a fundamental part of the commercial and financial growth of this country. Correlated with this proposition is the equally demonstrable statement that, to the extent that power and force present advantages to this country, to the same extent must that power and force uncontrolled tend to become a menace.

Trusts are a national force and have outgrown the confines of mere state legislation.

State Legislation

The subject is national in extent, the interests are national, the best public opinion is national, but legislation is state and sectional.

All laws are supposed to be but the formation of an intelligent public opinion based upon an understanding of the situation and a just appreciation of the interest of the parties involved.

Limitations of State Legislation

As to corporation law public opinion to-day, when it reaches what ought to be its highest stage of efficiency as a force, becomes under our present system of state statutes and state corporate legislation, circumscribed and limited in its efficiency.

1. Always circumscribed geographically by the limits of the state creating the statute.

2. Generally dwarfed in its birth by the subordination of the general principle involved to the local and ofttimes political state issues.

3. Frequently limited in its application by the elimination of the question of the good of the nation and by the subsitution for the welfare of the country of the interest, frequently political, quite generally financial, of the state in question, even to the prejudice of other states.

4. Sometimes formulated as a part of a political system which looks to the good of the party, rather than to the best interests even of the state.

There is to-day no forum in which a public national opinion in regard to the great national question of trusts, their advantages or disadvantages, their uses and abuses, can be heard and the judgment of the nation formulated into nationally created and nationally enacted public law.

All of these great and vitally important national questions are relegated to the geographical limitation, to the financial rivalry and the political systems of the states, with a result that South Dakota, West Virginia and Maine on the irrespective lines of policy formulate a public opinion in the shape of a statute which in its resulting effect, passes over and into the state of Massachusetts, relating to and affecting the property of the citizens of Massachusetts.

The citizen of Massachusetts who is a stockholder in a South Dakota, West Virginia, Maine or Delaware corporation is relegated to the formulated public opinion of that state for the determination of his rights, according to the statutes and laws of that state, perhaps in disregard of public opinion, formulated or unformulated, in which he may concur, and which prevails in his own state.

We can look for no effective publicity—no effective restrictions or regulations of corporate power under a system of diverse state legislation.

Laxity of legislation as a rule fixes the standard upon the principle that "the team is no faster than the slowest horse."

Public opinion formulated into statutes, to be of the highest efficiency and to be freed from evils of subordination, must be uniform among all the states and national in extent.

Uniformity of State Legislation Impossible

A study of the inception, the history and the growth of the corporate legislation of the respective states impresses one with the fact that the tendency of states in the matter of corporate legislation is to segregation rather than to unity, to diversity rather than to uniformity.

Many states whose corporate system of legislation is of a high order have not only approached this system at the inception of their laws from different view-points but have, upon that viewpoint, built up a legislative scheme, and also have a thoroughly adjudicated system of case law upon this subject.

Massachusetts, Pennsylvania and New Jersey are examples.

Massachusetts strongly, Pennsylvania, perhaps, less urgently, insist upon public publicity for all corporations, public, quasi public or private. New Jersey, on the other hand, insists on and has consistently adhered to the principle of private publicity as being the better doctrine for business companies.

As to the issuance of stock, they differ in theory, Massachusetts more nearly taking the position of insisting upon an official state valuation for stock, while New Jersey, not permitting stock to be issued for services (the great vehicle for the transmission of water, so-called, into corporate organizations), permits the issue of stock for property or money, but compels publicity to the extent of requiring the corporation in the certificate of payment of capital stock, and thereafter in each annual report, to distinguish between that stock, which is issued for cash and that which is issued for property.

By means of private publicity, every stockholder can ascertain for himself for what property the stock is issued.

Massachusetts and Pennsylvania take the stand that stock must be issued for money or money's worth, and that the state and the courts are the judges both as to law and the fact of what is the value of the property for which stock is issued.

New Jersey takes the position that this is too dangerous for the stockholders because of the tendencies of juries and courts after a failure, looking backward, to minimize values of property; and therefore she makes as the standard the judgment of the Board of Directors as determined and declared at the time of the issue, provided that judgment is free from fraud.

Honest and thorough students of economics differ as to the true standard, but New Jersey's principle is more in accord with the English doctrine in this respect.

The position of the speaker in regard to New Jersey's corporation laws is too well known to need explanation, even if it were of interest. It is, however, not inappropriate to say that I view with favor the legislative theory of private publicity and of honest valuations by directors, not subsequently reviewable as to values by juries as issues of fact except in case of fraud, provided those valuations be always ascertainable, so that the public may know precisely for what the stock stands.

New Jersey's system of corporate legislation is often asserted to be loose and lax, but the assertion is sometimes made by those who have not made a thorough study of the laws and decisions of that state.

The assumption that it is due solely to the so-called liberal features of New Jersey's law that she has attracted capital to her borders is a mistake. On the contrary, it is my belief that the permanency of her corporation policy, the provisions of the constitution protecting the corporate dollar from any other or further tax than the individual dollar, and prohibiting special legislation and special charters, the business like administration of her executive offices—as instanced by the fact that one Secretary of State remained as head of that important department for twenty-seven years—the intelligence, integrity, and high character of both Bench and Bar, that these elements have given the public confidence in the stability and in the administration of her laws and have brought capital, business, trade and commerce within her borders, with the legitimate return by way of tax income. The success of New Jersey

has led other states into the erroneous conclusion that the liberal features, so-called, of her laws have brought capital to New Jersey, and this has induced them to adopt the utility provisions of New Jersey's laws without the elements of control and regulation, which latter are an essential and permanent part of her system.

Whatever, however, may be the verdict of public opinion upon this point, the first suggestion which I have to make is that the better class of states are built up upon different systems, and that an attempt to make them uniform would necessitate a reversal of the legislative and judicial history of the state with regard to corporations—an outcome which state pride, if nothing more, tends to prevent.

Rivalry business creates the legislative policy of protection for domestic corporations, of antagonism and warfare against foreign corporations.

Some of the so-called charter-granting states have charters for sale.

They are looking, not only for the initial fee for the organization of the corporation, but also for the yearly return in taxes.

The trend of state legislation is sometimes to enact laws with a view to procuring pecuniary returns to the state rather than adhering to sound principles.

Corporate measures are apt to be weighed by some legislatures

First upon monetary scales;

Second, upon political scales;

Finally, if found satisfactory by these tests, then by the standard of propriety and integrity.

States seek to import into their own scheme of legislation provisions of the incorporation laws of other states which seem to have proved attractive to corporations and to have brought business and revenue into the state.

The authors of New York's so-called "liberalizing act" laud this and that provision as being from New Jersey's law, without much attention being paid to the question whether or not

the provision thus imported and thrust into New York's corporate scheme harmonizes with the rest of New York's law, or whether or not it carries with it the accompanying restrictions of New Jersey's law.

The controlling question seems to be one of immediate financial returns, of financial expediency and resulting political desirability.

In the reported hearings by a New York Legislative Committee upon Senator Krum's bill to tax foreign corporations, the issue seemed to be whether New York could take over New Jersey's income from corporations; could keep its corporations at home and bring others into the state.

Speaking of the proposed Krum bill to tax foreign corporations, a New York corporation lawyer is reported to have said before the Senate Committee:

"I want to say to you that if you fix it so corporations can't luxuriate here, they will find other fields in which they may flourish."

Chairman Krum: "Didn't we liberalize the incorporation laws at the last session?"

Mr. White: "Yes, and I helped you to do it."

Chairman Krum: "So you did. And now it looks very much as if we had bought a gold brick.

"The promises that you held out to us have not been fulfilled."—(New York *Times,* January 22, 1902.)

The New York illustration is used only because it is near home. Few states are so free from fault in this respect that they can afford to cast the first stone.

Special legislation for the benefit of any particular corporation, because of the revenue the corporation brings or is expected to bring to the state, is open to the charge of being legislation for a price, especially if the character of such legislation be manifestly unsound in principle.

The support of the legislature as a body given to the passage of an act in consideration of a moneyed return actual or prospective, to the state, provided the act is otherwise unjustifiable, leads to the charge of being state legislation for a price,

and to the further charge that this class of legislation tends to corruption on the ground that an example is set by the state, which is sometimes followed by the individual legislator in individually legislating for a price.

It is needless to add that this statement is not always well founded; but the fact that such legislation is open to suspicion and gives rise to such charges is a good reason for its avoidance if not its condemnation.

The granting of special charters to individual corporations, with special or unusual privileges and immunities, tends to create public distrust, not only respecting the integrity of the legislation, but also as to the freedom from bias of the individual legislator.

As I have before said, one of the commendable features of New Jersey's corporate legislation scheme is that the constitution of that state prohibits such special legislation with respect to corporations, and compels all corporations of a given class to incorporate under the same act, with the same rights and privileges and subject to the same restrictions and control.

However, in the discussion of the tendencies of this certainly objectionable class of legislation, a distinction must be observed regarding state legislation, not special, but for legitimate tax revenue.

The fostering of legitimate capital and the inducing of corporated capital to locate within the borders of the state are not only legitimate but commendable in every way.

The securing of proper returns to the state by way of taxes is eminently proper, and economically commendable.

State Warfare

In corporation matters in many instances the tendency is to interstate warfare, each state assuming a belligerent attitude towards foreign corporations and endeavoring to protect its own corporations.

We find some charter-granting states legislating for the following classes of corporations:

(1) Corporations organized primarily for the purpose of doing business outside of the state;

(2) Corporations organized for the purpose of doing without the state business which is forbidden to be done within the state which created them;

(3) Those formed for the purpose of doing their business as an entirety outside of the state being specifically forbidden by their charters from operating or carrying on such business in the state which created them;

(4) For the express purpose of doing business in evasion, sometimes in violation, of the law of a state into which they purpose to go and to operate.

On the other hand, we have states attempting to tax property of corporations—as the state of New York in the case of the United Verde Copper Company (People *ex rel.* United Verde Copper Co. *vs.* Feitner, 54 App. Div., 217)—not within their limits and therefore taxed elsewhere; and we have some states attacking domestic and foreign corporations with laws tending to make it difficult to associate capital for commercial operations too large for individuals.

As early as 1866 the state of Pennsylvania granted a special charter to the "New York California Vineyard Company," giving it the power to do the business set out in its charter "in any of the United States or territories thereof *except in the state of Pennsylvania* as a natural person."

Subsequently, in 1870, the name of the company was by special act changed to the "Land Grant Railway and Trust Company" and it was given banking powers to be exercised "in any state, territory or country *except the state of Pennsylvania.*"

The state of Kansas thrust out this corporation from its borders, refusing to allow it to do business there.

The Supreme Court (6th Kansas, 255) said:

"At the very creation of this supposed corporation its creators spurned it from the land of its birth as illegitimate and unworthy of a home among its kindred and sent it forthwith a wanderer on foreign soil. Is the state of Kansas bound by any kind of

courtesy or comity or friendship, or kindness to Pennsylvania to treat this corporation better than its creator (the state of Pennsylvania) is found?

"No rule of comity will allow one state to spawn corporations to send them forth into other states to be nurtured and do business there when the state first among states will not allow them to do business within its own boundaries."

In the year 1897, New York introduced certain legislation tending to make the stockholders and directors of foreign corporations personally liable for the debts of the company in New York, provided, and if, the corporation failed to conform to certain New York requirements.

New York attempted forcibly to domesticate foreign companies under penalty of practical withdrawal of the corporate shield of protection to stockholders and officers, imposing a contract liability on stockholders and directors.

This was understood to be aimed specially at the numerous New Jersey corporations doing business in New York.

As a counter move, a bill was drawn, passed by the New Jersey legislature and signed by the governor, all within forty-eight hours, making it the law in New Jersey that such corporate liabilities created by the statutes of other states were not enforceable in the state of New Jersey.

The passage of this act was sufficient to end the usefulness of the New York acts.

New York has its railroad and transportation laws and forbids local railroads, telephone or telegraph companies to organize under any other act.

The state of New York refuses to give such organizations power to do business in New York state unless they accept the conditions and restrictions of the railroad and transportation laws.

There is, however, pending now in the legislature of New York a bill providing that it shall be lawful to incorporate any company under the Business Corporation Law "for the purpose of constructing, maintaining and operating railroads, telephone or telegraph lines outside of this (New York) state."

The case of New York is cited because it is the latest among the Eastern states to sell telephone, telegraph and railroad

charters free from the ordinary restrictions thrown about such corporations, provided their operations shall be removed and kept out of the state of New York, and because this case is indicative of the tendency of the times.

The state of Connecticut, too, is not far behind in creating corporations to do outside of the state business which she will not permit to be done within her borders.

Connecticut recently created by a special charter a banking company with power to hold its stockholders' meetings anywhere in the world. In addition to banking powers the corporation was authorized "to transact the business of merchants, manufacturers, miners, commission merchants, agents of every kind, shippers, builders, financiers, brokers, contractors, and concessionaries," to construct private or public works of any sort or kind, but *"outside the state of Connecticut;"* to say nothing of power to act as common carrier and as express forwarders, *all outside of the state of Connecticut.*

As a limitation applicable to Connecticut and to no other state, the charter provides that before a corporation shall conduct a banking and trust business in Connecticut, it shall obtain a license or permit to do such business in the state of Connecticut and, to the extent that it does business in Connecticut, be subject to the supervision of the banking commissioners. So far as Connecticut was concerned or Connecticut citizens were involved, the welfare of the state was carefully guarded by the provision that the broad powers conferred upon the corporation of engaging in every kind of enterprise were limited to operations outside of Connecticut.

"No publicity" was the rule of this company. The charter provides that—

"No stockholder shall have any right of inspecting the accounts or books or documents of the corporation, except as conferred by statute or authorized by the directors, or by a resolution of the stockholders."

But to depart from specific cases.

Many states seem neither to look beyond their own borders nor to legislate for the good of the country at large or the good of the commercial movement of the times.

Few states in their corporate legislation seem to aim to assist the United States as an entirety, in its struggle for the commercial supremacy of the world.

On the contrary, many states are willing to enrich their own coffers at the expense of the advancement of the nation.

The line of demarcation between the so-called charter-granting states and the more conservative states is rapidly being eradicated; the financial success of charter-granting states is tending to break down the conservative legislation of many other states.

It is said that Massachusetts capital will not incorporate under the laws of Massachusetts; and, therefore, Massachusetts should amend its corporation laws.

Is the first question whether Massachusetts capital will incorporate under Massachusetts' laws or whether the Massachusetts' laws are right or wrong?

Is it a question of financial expediency and theory?

It needs no argument to enable the student of corporate legislation to come to the conclusion that the drift of state legislation is not towards uniformity, but towards interstate warfare.

This contest between states has reached that point where the state of Minnesota has openly charged the state of New Jersey with permitting a great corporation to be organized for the express purpose of doing the very things which are forbidden by the state law of Minnesota, and directly affecting property located in Minnesota.

Interstate warfare has resulted in Federal assumption of the matters in dispute where trade and commerce were unfavorably affected and thereby there became involved the "Public Welfare."

In the very early days commerce was the subject of a state war between New York and New Jersey.

New York imposed a duty on the farm and garden products of New Jersey which came into New York. The boats of the New Jersey men were seized, their cargoes of food confiscated, if they attempted to escape the payment of this duty.

New York had put on a bit of sandy shore, now known as Sandy Hook, a lighthouse for the guidance of commerce coming into New York city.

New Jersey in retaliation taxed this at the rate of $1,800 a year.

The Supreme Court of the United States ended that war.

New York granted to Robert Fulton and others the exclusive right to operate vessels propelled by steam up and down the Hudson River and into the waters of New York Bay.

Men from other states who attempted to navigate vessels by steam from points in New Jersey to New York were enjoined by the New York courts.

The United States Supreme Court freed trade and commerce from state exactions and from interstate warfare by holding that states had no jurisdiction over what is today called interstate commerce, and the decision in Gibbons v. Ogden (9 Wheaton, U. S. 1) is interesting reading from a retrospective standpoint.

Many other instances might be cited, but the principle is well recognized.

A glance at the history of the growth of corporate legislation in Germany is interesting, as showing that along with the demand for freedom of incorporation there developed a public demand for uniformity of corporation laws throughout the German Empire.

Prior to the nineteenth century there were but few business organizations in Germany, and these were semi-public institutions. Few, if any, joint stock companies were organized in the first thirty years of that century. It is true that there was no political power at that time that could establish uniform corporations laws for all of Germany. The practices of different states differed materially. As a rule, a special act of incorporation was required for the formation of a business

company in practically all of the states, and Hamburg and Bremen alone permitted the free incorporation of joint stock companies.

Subsequent to 1830, the construction of railways, the development of banking and insurance, and finally, the development of large scale production in manufactures, led to the formation of many joint stock companies and a demand for corporation laws of more general utility. Austria, in 1838, passed a general railroad law. Prussia enacted similar legislation later in the same year. In 1843, Prussia created a new law concerning joint stock companies in general, and in 1852 an imperial "patent" was issued in Austria on the same subject. These laws made some concessions to business companies; yet they required special authorizing acts for the formation of a company, and in many other respects were far from the modern idea of corporation laws.

As early as 1857, a realization of the evils of diversity of corporation laws led to a public demand for a reforming of corporation statutes. At that time, Prussia and Austria were the only states with general laws, excepting some of the Rhine provinces. In Hamburg and Bremen freedom of incorporation existed by prescriptive right. In many of the states it was a matter of controversy whether special authorization was or was not required for the formation of a corporation. The demands of a growing and modern business finally compelled the German states to adopt what were then radical measures.

Between 1861 and 1865, to a certain degree uniformity of legislation was secured by the adoption of a Commercial Code (Handelgesetzbuch) by the separate states. This, among other things, required a special act of authorization for the formation of a corporation and required the states to exercise strict control over such companies. Yet it permitted individual states to allow freedom of incorporation; and, accordingly, Baden, Oldenburg, Wurtemburg, and Saxony soon made this concession to business interests, as did also the cities of Hamburg and Bremen.

In 1868 or 1869 the Commerical Code was made a law of the North German Confederation. Yet, although some degree of uniformity was now secured, the law of Germany was too illiberal for the needs of modern business. In 1870 the Reichstag amended the law of 1868 in such a way as to permit freedom of incorporation; and this act has been the foundation of all later legislation of the German Empire.

This business demand for uniformity of legislation, and, as well, uniformity and concurrence of jurisdiction, led to the adoption of the Commercial Code by voluntary action of the separate states; it led the North German Confederation to make corporation laws the subject of federal legislation; and, under the present German Empire, it has resulted in imperial control of laws relating to business corporations.

The advantages of a National Corporation Act are seen not alone by the doctrinaires of the schools of economics. The demand for better and higher corporation laws has advanced beyond the realms of mere academic discussion and has given rise to a practical demand in behalf of the corporations. Giving all due credit for the inception of a demand for higher corporate legislation to the student of economics, nevertheless the corporation man is not today slow to perceive the advantage of better laws, national in origin, national in extent.

But as I read the trend of the times, there is a feeling which is taking shape as a public demand on the part of the true industrials, on the part of those organizations which desire that their securities shall be properly deemed and held as investments, that a different state of affairs shall prevail in regard to corporate legislation.

And on the other hand, many great corporations are becoming weary of the constant demands made upon them to meet and in various ways satisfy and avert diverse and hostile "strike" legislation of different states and territories.

Every corporation man recognizes the proposition that today there is practically—meaning actually—no such thing as enforced publicity in its length and breadth throughout the nation.

Neither are many other economic demands enforced under state legislation.

State legislation is more easily controlled than national, it can be managed more quietly and more secretly.

Bills for the benefit of some particular corporation or corporations, are frequently cloaked under the disguise of a public measure.

They are amendments so-called to existing laws, but they are actually the thrusting of new, and oft-times evasive matters into a section of the statute in which they do not belong.

Such acts can be passed, they are passed, in state legislatures.

They are not noted by the public because they are not always commented upon by the press.

An act passed in South Dakota affecting fundamental rights of the stockholder of a great corporation, a law quietly enacted in Delaware, in West Virginia, or in Maine might not be the subject of national discussion and national comment, and therefore, a national public opinion might not have an opportunity to be heard before its passage.

The managing editor of a great "daily" might not censure the news department if a bill should be introduced, rushed through and passed in the legislature of South Dakota or Delaware affecting a corporation whose visible and tangible property was in Massachusetts; but should a "sneak act" affecting great corporate interests be introduced at Washington, and on the very day of its introduction the majority of the press throughout the United States not be apprised of its introduction by their correspondents at Washington, there would be trouble in the head offices.

A federal law would put all legislation, proper and improper, in a glass case and expose it to the views of the entire public, so that it is true not only that proper publicity may be obtained, but it may be maintained by the national act and not otherwise.

Upon the introduction of any corporate law under a national system the representatives of every state would be heard up-

on the subject, and the citizens of every state would be heard through their representatives either in the National House of Representatives or in the Senate.

Public opinion of every locality would be transmitted through the representative of that locality and made an integral part, either in the opposition or the promotion of the measure.

A national incorporation law would truly represent and be the formulated public opinion of the nation.

The question may be asked whether or not corporations would voluntarily avail themselves of this national corporation law.

I answer this question unhesitatingly in the affirmative.

The national law should contain a provision along the lines of that part of the national banking act which authorizes state banking institutions to become national banks without great disturbance internal or external.

Corporations now and hereafter organized would avail themselves of a national act.

First.—For reasons of self protection. It has been already stated that it has become necessary for the sound corporations to differentiate their position from those otherwise situated.

This is shown in the tendency to publicity on the part of organizations such as the United States Steel Corporation, the National Biscuit Company and others equally entitled to mention.

It is quite necessary for sound corporations to create a public distinction involving a recognized difference between themselves and those who are following in their wake and attempting to imitate their standing and position.

Today mere capitalization means nothing.

Companies with an authorized capital of $50,000,000 in South Dakota cost somewhat less than the charge of an average tailor for an ordinary suit of clothes.

Second.—Financial interests will favor it.

No great corporation can be put upon the market without a financial syndicate. No matter how great or how strong is that syndicate it must go to the banks for its money.

The banks will not perpetually advance to the syndicate funds upon the underwritings or other securities. It is necessary for the financial syndicate ultimately to get to the public to relieve the banks.

The bankers know this, and the banks, therefore, would insist, before they would advance the funds, that the corporation should be organized in such a manner as would insure at least the most confidence on the part of the investing public.

The bankers would insist that the financiers organize their company under that law which would inspire the greatest public confidence in order that the public would ultimately invest.

Should the promoters refuse to do this the result would be that the banks would not advance money to the syndicate on its underwritings and the syndicate would fail to get its holdings taken by the public, because the public would question the syndicate's action in refusing to avail itself of a national law.

Third.—Corporations would avail themselves of this law as a protection against the varied, diverse, and today inconsistent laws of various states.

The tendency of the states is to attack foreign corporations, and therefore, a great corporation would avail itself of the privilege of becoming a United States corporation. Such a corporation, being foreign to no state, would secure to itself the privileges and immunities of a citizen in every state.

It would secure uniformity of legislation throughout the length and breadth of the United States.

States may drive out insurance companies, but they cannot drive national banks out, because the national bank derives its existence from a power higher than that which confers a charter upon a state-created organization.

Fourth.—No corporation engaged in interstate commerce, no corporation desiring to do business throughout the length and breadth of the country, could afford to be other than a national organization.

It would not be long before the investing public would draw the lines sharply between state-created organizations as-

suming to do a business national in extent and true national corporations.

The successful combination must be in its nature a national organization in order even to pretend to carry out the economic theories upon which it is based.

Given a law which creates real national corporations, and all others would become imitators and be so known to the public. The public would refuse to take the stock of such an organization on the same principle on which it would refuse to take a counterfeit bill.

National Conference on Trusts and Combinations, Proceedings. 1907. pp. 272-8.

Regulation of Transportation Rates. Robert Mather.

Powers of the Interstate Commerce Commission

Though the commission has been in possession of the rate-making power for more than a year, the power has not yet been directly exercised. Within that year, however, the rate-making and other regulatory powers of the several states have been exercised to an extent and in a degree unparalleled in any previous period. Some of these requirements are in direct conflict with Congressional regulation of the same subject. Others indirectly but quite as effectually invade the proper sphere of federal influence and power. The Hepburn Act requires the Interstate Commerce Commission to prescribe for common carriers the method of keeping their accounts, and makes it unlawful for such carriers to keep any other accounts, records or memoranda than those prescribed by the commission under penalty of $500 for each offence and for each and every day of the continuance of such offense. In the teeth of this federal regulation a state commission prescribes other methods of keeping the accounts of carriers relating to their interstate business, and disclaims any desire to discuss with the Interstate Commission the palpable conflict between state regulation and federal law. State laws have reduced the pas-

senger fares and rates of freight, and upon complaint and showing by the carriers that the reduced rates are so far below the point of reasonable compensation as to amount to a taking of their property without due compensation and a denial to them of the equal protection of the laws, the consequent and logical appeal to the federal courts for the protection assured to them by the federal Constitution has been met by the claim that no injunction of a federal court can issue against the enforcement of the state law except upon final decree in the Supreme Court of the United States. And to the support of this novel theory, refuted by the uniform practice of the federal courts since their institution, state executives have pledged the martial power of their states. Conflict more serious in its threatened consequences than that of the courts has been narrowly averted, and temporary obedience to enactments that may yet be adjudged to be not the law of the land, because violative of protective provisions of the national Constitution, has been compelled by threat of force.

National Conference on Trusts and Combinations, Proceedings. 1907. pp. 121-7.

National Control of Railways. Seth Low.

It is easy to say that the jurisdiction of the United States is limited to interstate commerce, and the jurisdiction of each state to commerce within itself. But that leaves open the question, what are the limits of interstate commerce? To answer that question one must consider both history and present fact. There are two clauses in the Constitution of the United States, as Judge Amidon recently pointed out, and not one only, that bear upon the subject. The first is the clause forbidding any state to levy duties upon imported merchandise; and the second is the clause placing inter-state commerce under the control of the general government. In other words, the framers of the Constitution, having seen how ready each state was, in the days preceding our present Union, to advantage itself by laying

burdens upon its neighbors, inserted these two clauses to obviate this danger. They forbade, explicitly, direct attacks by one state on the commerce of another, in the form of duties; and then, recognizing that what the states could do directly, they could also do indirectly, the whole subject of interstate commerce was placed under the general control, in order to make it impossible for any one state to injure another.

Forces Which Favor National Action

So much for history. Now for the present fact. As long as strong individuals could get favorable terms for themselves, they were indifferent to the question of freights as that question affects localities. But it may be taken for granted that the end of rebating has introduced the day of strife between localities for what each will call fair treatment. As competing localities are often, if not always, in different states, the appeal of each state to protect its own is likely to become more and more urgent. In the rate bills already passed in different states, there is complete disregard of the effect of the action of one state on the railroad service of any other state. This is a force, therefore, making steadily for federal control. In other words, it is a modern exhibition of the spirit that originally caused the interstate commerce clause to be placed in the United States Constitution. The railroads themselves, also, have done everything to make federal control inevitable; for they have shown themselves if not lawless, at least disposed to select for themselves the law that they propose to obey. They have incorporated in the state that will give them the most favors; and they have pursued their devious ways in and out between the state and federal law with almost the capacity of water for finding the weakest spot. The enquiry now going on in New York into Standard Oil affairs has revealed how skilfully large corporations are advised, so that they can evade an unwelcome requirement of federal control by taking refuge under state control. When state control pinches, they appeal just as readily to the federal law. This state of facts tends constantly to the widening of the meaning of the words, "interstate com-

merce," in the United States Constitution. It seems to me altogether likely that these words will ultimately be given a meaning so wide as to embrace all commerce as to which there is any possibility that action by one state may affect unfavorably any other state. In other words, I think that ultimately one law will govern all railroads bearing interstate relations in substantially all their relations to commerce, whether within the state or without the state. However great the fear of the common people may be of centralization in government, I think that fear will prove to be less great than their fear of centralization in corporations controlling the highways of commerce, that are so far lawless as to be able to select, largely at their own pleasure, the law that they will observe, whether national or local.

National Conference on Trusts and Combinations, Proceedings. 1907. pp. 159-76.

Trust Problem. Isaac N. Seligman.

We arrive now at what is probably the most important question under discussion, namely, as to whether there should be a national incorporation of the holding companies known as trusts. It appears to me beyond any reasonable doubt that a national regulation of our corporations is desirable and even essential. It is desirable in the interests of the corporations themselves. It is difficult to conceive of the possibility of establishing any uniform intelligent regulation of corporations, if every state is permitted to pass its own laws. It is well known that in some states extended privileges are offered to incorporators of companies; while in others great difficulty is encountered.

Perhaps the most stringent and satisfactory law that has been passed by any state is the Massachusetts Business Corportation law in 1893, providing for publicity and for the general control and supervision by the state government. Considering, on the other hand, the lax laws of New Jersey, Delaware, West Virginia and the other states, by which these

states grant corporations privileges and rights at variance with those of each other's laws, the conclusion is forced upon us that effective and lasting remedies can be enforced only by the national government. It has been truly said, "As commerce becomes wide in its range, so must legislation proceed from a source of authority equally great and comprehensive." With the ever growing magnitude of our modern commercial and industrial processes, the inactivity of the central government would leave some states to attempt a regulation for which they are eminently unfitted, because of the interstate character of the operations. I firmly believe that the granting of a Federal franchise or license to engage in interstate commerce would tend fully to protect such companies as remained within the law and would defend them from harassment by forty-five separate legislatures.

National Conference on Trusts and Combinations, Proceedings. 1907. pp. 107-14.

Uniform Federal and State Control over Interstate Matters.

Charles F. Ziebold.

The unalterable fact is, that the original theory of our dual system of government, and the existing conditions, as developed in the flow of years, have travelled in opposite directions, and our only present alternative is to harmonize the widely divergent theory and conditions by conforming the theory to the existing conditions or causing the existing conditions to meet the orginal theory. The former alternative would be proper, logical, safe and possible, and the latter is physically and legally impossible; impossible, because we are as much the creatures of environment collectively as a nation as we are separately as individuals, and the environment of our present domestic, social, commercial and industrial conditions is the will and wish of the people (developed by the evolution of changing needs and circumstances), embodied into an unwritten law of daily habit and practice superior to and beyond the mere written law, legislative or constitutional.

And to conform this orginal theory to the existing conditions would necessitate a radical change in the relation now obtaining between the United States and the several states; a change that would substantially establish the same legislative and constitutional relation between the United States and the several states as now obtains between those states and their respective counties and cities.

New Conditions Demand a New Distribution of Authority

We realize that in the eyes of many persons this suggestion will appear as an unpardonable and destructive sacrilege, a ruthless and thoughtless attack upon the inspired and infallible wisdom and foresight of our revered forefathers. Nevertheless, the fact remains that they, able and astute as they were, but builded on conditions as they then existed, and could not anticipate conditions as they now exist. They could not know that rapid transit, rural delivery, the telephone, the telegraph and other modern facilities for widespread and convenient transportation and communication would practically resolve all our more general domestic, social, commercial and industrial activities into interstate enterprises, which would require for their legitimate and profitable existence and development uniformity of federal and state control and regulation.

If we should have national coinage, bankruptcy, naturalization, postal regulation and other like laws, because conditions seemed to render them advisable and expedient, why not national negotiable instrument receivership and assignment, election, telephone, telegraph, railroad, interstate street railway, marriage and divorce and other like regulation laws, when existing conditions seem to render them similarly advisable and expedient?

That there should be uniformity of federal and state control over these matters is scarcely debatable, and that the present method of attempted dual regulation is clumsy and inadequate is evidenced by the continual friction, cropping out between state and nation in our courts and elsewhere. Because of which we daily witness the colossal folly of the people of the several states quarreling and contending with themselves

as the people of the United States, as if, as a people of the several states they were one nation, and as a people of the United States a different and hostile nation. True it is that the traffic or activity which is confined to any one state should be under the control of that state; but for the same reason the moment it expands itself into another state it should be, for the sake of uniformity, under the control of the United States.

But under the present system of operating railroads, who can say when their traffic is state and when interstate, without becoming involved in the endless confusion of practical details? Who will say that the idea of a marriage or divorce being legal in one state and illegal in another is not repugnant and intolerable?

Who will say that the old-time characteristic antagonisms and differences of habits and belief of our people, racial, religious, political, social, commercial and industrial, nurtured by the enforced isolation of these times, have not largely, if not entirely, disappeared in consequence of modern improved conveniences that have practically eliminated distance and annihilated time? In those days, when conveniences for rapid transit and communication were lacking, when education was less general than now, when news travelled slowly, when newspapers were scarce, and when, because of such isolation, concerted action by the people at large was difficult, and communities were compelled to rely upon themselves more or less, it may have been well for such communities by states to be jealous and fearsome of any outside encroachment of authority or interference. But conditions are radically different to-day, and the inhabitants of the most widely separated sections of our country are now nearer neighbors than were the residents of adjoining states less than fifty years ago. Uniformity of control by nation and state thus becomes the keynote for the solution of the many vexing railroad rate, trust and interstate traffic regulation problems, and the other like problems created by the gradual nationalizing of our social and domestic life and commercial and industrial enterprises.

National Power Should Be Commensurate with National Needs

To determine the character and degree of this uniformity we should take stock of ourselves as a nation, and broadly fix upon what shall be deemed interstate and what intra-state business and traffic, and then permit nation and state each to be supreme in its own field of activity. Man cannot have two masters in reference to the same subject matter without suffering the palsy of confusion and uncertainty engendered by such an attempted dual control.

And if it is desired to properly apportion our powers of government between nation and state, such apportionment must be founded on the universally accepted rule that the rights of the few are subservient to the rights of the many, or, more definitely stated, that the separate rights of each person are subject to the collective rights of all persons. This rule found its first expression in the so-called social compact, the beginning of all organized government and society.

Thus the state is the supreme authority over the county and city, the county and city over the township and ward, and the township and ward over the precinct. Power travels down from the larger power to the smaller, not up from the smaller to the larger. Excepting only in the relation between the states and the United States, the states continue to insist upon the reversal of the rule, and contend that in this particular instance power travels up from the smaller to the greater body; that is, up from the state to the nation, and not down from the nation to the state. The logic of events and the necessities of existing conditions now demand the adoption of the general rule as between nation and state, and that the states be placed in substantially the same relation to the United States as our counties and cities now occupy in respect to their several states.

Annals of the American Academy. 32: 218-24. July, 1908.

Nation Should Superintend All Carriers. C. M. Hough.

To clearly state a question, one may assume some matters as axioms without necessarily giving them adherence. When

however, in a democratic country, the question put is political, such assumption justifies a suspicion that the speaker believes the sense of the majority, if not a majority of the sensible, to be in favor of the matters taken for granted.

In this spirit I regard as axiomatic these propositions,—that corporations require governmental control; have received too little in the past, and will get a great deal more in the future; that the desire for such control grows largely out of the majority belief that men accustomed to large affairs are somehow untrustworthy, and must be restrained by those less competent in business but more numerous at the polls; that any business affected by a public use must be regarded as a public trust, wherein the trustee is to be governmentally coerced into conduct primarily pleasing to the majority, and it is charitably and sometimes pharisaically hoped, incidentally profitable to himself; and that this governmental control must usually be in the hands either of Congress or a legislature, but in some cases should be divided between them. After making these assumptions, I believe the subject in hand is an inquiry, as to which control center will upon the whole yield the greatest degree of justice, compatible with public convenience.

If the discussion were to take full scope, it might well be asked why *corporate* control only should be considered, for it is obvious that control of corporations as corporate bodies is a comparatively small matter. It is control of *business* at present largely conducted by chartered companies, that is the question of the hour, in a day when economics have become politics, and political economists are thought producible by referendum or initiative. If business is to be controlled, it is obvious enough that the substance thereof and not the form of transacting it must be finally regarded by the law,—partnership and private affairs will not be protected from governmental supervision by any absence of incorporation.

Since, therefore, several hundred years of legal history have marked the business of a public or common carrier as one peculiarly within the regulatory or police power of the sover-

eign, I have ventured, on your president's kind invitation, to speak regarding, not the legality, nor immediate possibility, but ultimate necessity of national control of carriers if the demand for supervison remains insistent. The argument of convenience will usually win in the long run, unless it encounters a moral principle, and that argument favors a centralized control, removed alike from local prejudice and local pride. Is there any moral principle, requiring a business covering navigation, railroads, expressage, telephony and telegraphy, to remain for the most part under the control of forty-six sets of regulations and regulators, when the business itself is national and international, and competition has perceptibly become an economic international conflict?

The impossibility of a fair uniformity, or uniform fairness on the part of so many laws, legislatures and commissions, to the men and affairs regulated, will in time weary all but those who hope for place under one of the conflicting systems, or doctrinaires to whom a theory is dearer than the removal of conditions, however odious. For modern evidence of how divergent and irreconcilable in scope and purpose, and how impotent for ultimate good, our present multifarious systems are and must be, one need but read the published reports of proceedings of the National Association of Railway Commissioners, bulky volumes, not to be considered without sorrow and some cynical amusement.

Secretary Root has recently appealed to the several states to bestir themselves for more efficient governmental regulations, and to subordinate local interests to general welfare. His voice is of one crying in the wilderness, for it is as true now as when Mr. Pinckney said it in 1787, that "States pursue their interests with less scruples than individuals." The Supreme Court has already repeatedly considered endeavors of state authorities to compel the transaction of railway business in a particular state or part of a state at a loss, upon the plea that the interstate business of the compelled corporation was sufficiently profitable to warrant the local gift. Such a gift is indeed a benevolence in the legal and disreputable meaning of the word. Nor

has it been unknown that men in local authority have threatened carriers with drastic hostility in local matters, were not interstate rates made more agreeable to constituents. This is retaliation, not administration, and until the unity of commerce is recognized by putting its agencies under one control, such manifestations of local self-seeking will continue, and probably increase.

It is now notoriously true that the carrying enterprises of the nation, from railways to telephones, are largely owned (if not abroad) in parts of the Union remote from the carrier's region of operation. Can it be denied that the last few years have shown a determined recognition and punishment of absentee landlordism on the part of local authorities engaged in regulating carrying corporations? Such denial is impossible, and it is equally impossible to anticipate a termination of that condition as long as local capital remains as limited as it is in most of the United States, while local rates for money remain higher than the highest return reasonably to be expected from the carrying trade conducted through corporate organization. In most of the states local money does not go into the carrying trade, because it can be more gainfully employed otherwise, but that fact never induces local authorities to recognize the local money rate as the carrier's return rate. It is surely a legitimate position for the public to take, that the owners of the carrying corporations shall have a voice, however still and small, in the selection of their regulators, by making the selection a national and not a local affair.

Again, if conditions perfectly well understood in our older and richer states be considered, the observer must recognize as a figure familiar in the business and political background the corporation of numerous local shareholders of large local influence, and for the time being obnoxious to no considerable class in the community. Has a foreign rival, a new competitor, a fair chance before the local regulatory bodies in opposition to such a carrying corporation? No man of experience in interstate business can answer that question affirmatively, and by just so much as local regulation becomes more organized and better

established and more drastic if not more efficient, by just that much will local pride and local prejudice give to local enterprises a preference undue under the law and undesirable for the people at large. Nor is it either a vain imagining or a jeremiad that a really active, vigorous and selfishly able administration of the carrying business by the coast states may become, and in no long time, a serious grievance to interior producers.

But it is not an unusual change of public attitude for a corporation to become, through the misdoings of one man or the mistakes of a few, an object of local execration. Its pursuit and punishment become political virtues, in which all parties strive to excel. This condition is so frequent to-day, that to name any special corporation would be an invidious distinction. Will not national control allay, if not prevent, local inflammation and render more difficult destruction of what should be cured, but need not be killed in the process?

The relation of foreign to domestic commerce is a subject not to be exhausted by many hours of discussion, and it is of growing importance. The two are interdependent. If domestic operations are disturbed or ill-managed, foreign commerce will suffer. While no matter how well arranged the local management of a state's commercial affairs may be, no one state is strong enough to withstand, and indeed it will not ordinarily discover until too late, foreign domination of its domestic commerce. I do not admit this to be wholly a glance into the future, but the facts of to-day are not publicly understood, and probably nothing will convince any considerable portion of the people of the United States that a real danger here exists, until they discover themselves pecuniarily injured, and by overwhelming evidence.

There is another matter very presently before the public, and as to which the utter inefficiency of state control has been demonstrated beyond peradventure. Next to land investments, the railroads of this country most largely represent the savings of the labor of an industrious people for some hundreds of years. Mr. Mather, of the Rock Island Company, said last fall:

"There is a prevailing public belief, based on facts publicly known, that railroad corporations have issued corporate obligations and applied the proceeds to purposes other than those for which such obligations may lawfully be issued." This he regards as the great railway wrong doing—well known and long continued, and principally productive of that condition of the public mind, which renders our present discussion opportune. He need not have confined his indictment to railroads. The carrying corporations as a class are not more guilty than others, but they have greater opportunities of guilt. With inconsiderable exceptions every carrying corporation in the country is incorporated by a state. Have the states generally attempted to limit the capacity of their corporate creatures for working harm in this way? Certainly not. And can they do it? Considering how states bid against each other for corporate business, it is doubtful. Would they do it if they could? What inducement is there for either the legislative or the executive department of a small or poor state to control the financial operations of a corporation whose financial business is wholly conducted in other states? There is no self-interest requiring the regulations, and I doubt the power of altruism to bring it about.

No one believes, and I am as far as possible from asserting, that national control would be perfect or always wise, but it is necessary. If it be worth while to avoid unnecessary multiplication of conflicting laws; to set a bound upon local selfishness; to protect those citizens whose property is represented in carrying corporations of a state not their own; to limit the power of some favored corporations; to protect perhaps the same corporrations when political rancor turns against them; to recognize and foster the close relation between foreign and domestic commerce, while presenting a firm front to un-American domination, and to limit by national power the financial operations of common carriers of all sorts then national control must come. If these things be worth attempting or possessing, then so far as the legal framework of our country will permit, the effort of all thoughtful citizens should be to secure control of all

the instrumentalities of commerce for the nation as opposed to any and every smaller governmental unit. Whether the result which seems to me desirable be also constitutional is a question not to be elucidated in twenty minutes or twenty days—nor is this the place for such technical discussion.

Moody's Magazine. 1: 163-7. January, 1906.

Federal Search-Light. Harry E. Montgomery.

The power and authority of the Bureau of Corporations in the Department of Commerce and Labor should be enlarged by congressional action under the Inter-State-Commerce clause of the United States Constitution as interpreted by Chief Justice Marshall in the case of McCulloch vs. Maryland (17 U. S., 408), so as to include the right to grant charters of incorporation to all who seek to engage in interstate or foreign trade. This bureau should not only have this power, but it should prohibit all corporations, joint stock companies and other forms of organizations, railroad and industrial, now existing or which hereinafter may be chartered by it. This bureau should have not only the sole right to incorporate associations engaged in interstate and foreign commerce, but it should have absolute and complete control of its corporate children.

The Commissioner, or head of the Bureau, through his staff of examiners, should examine annually, and at such other times as in his judgment may seem proper, into the affairs of all railroad and industrial corporations chartered by his department. This examination should include an inspection of all books, agreements, receipts, expenditures, vouchers, and reports of meetings of directors and stockholders. Power should be given him to compel the attendance of witnesses to be examined under oath, and to call experts to testify. The Commissioner should also have the power to require railroad and industrial corporations to furnish, from time to time, such statements in regard to the conduct of the corporate business and such other data as may, in his judgment, be deemed necessary to a complete understanding and an accurate knowledge of

all the facts pertaining to the business transactions and the condition of the corporation.

The Interstate Commerce Commission in its last annual report, in considering the necessity of a governmental power of inspection of the books of transportation companies, says:

"Probably no one thing would go further than this toward the detection and punishment of rebates and kindred wrongdoing."

It is contended, and with much force, that the following acts provide sufficient substantive law and adequate administrative machinery to cover the main grounds of complaint against the railroads.

(a) The Interstate Commerce Law requiring every common carrier to file with the Interstate Commerce Commission copies of its schedules of freight rates, and declaring it to be unlawful for any common carrier "to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of . . . property, . . . than is specified in the schedules filed," and for a violation thereof, "be subject to a writ of mandamus, to be issued by any Circuit Court of the United States . . . and the failure to comply with its requirements shall be punishable as and for a contempt; and . . . a writ of injunction . . . to restrain such common carrier from receiving or transporting property among the several states."

(b) The Elkins Act, declaring that "the wilful violation upon the part of any carrier . . . strictly to observe such (published) tariffs until changed according to law, shall be guilty of a misdemeanor," and further declaring it to be unlawful "for any person, persons or corporations to offer, grant or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier . . . whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier," and providing that "every person or corporation who shall offer, grant, or give, or solicit,

accept or receive any such rebates, concession, or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

(c) Section 5440 of the United States Revised Statutes defining conspiracy against the United States and prescribing as a penalty for its violation a fine and imprisonment for not more than two years.

(d) The decision of Clune vs. United States (159 U. S., 590-595) holding that a conspiracy to commit a crime, itself punishable only by a fine, may be punished by imprisonment. In brief, if two or more parties enter into a conspiracy to give and to receive rebates, as prohibited by the Elkins Law, the parties are liable to imprisonment under Section 5440, above cited.

The non-enforcement of these laws is due very largely to the fact that the government is unable to obtain the facts upon which the violators of the law can be convicted.

While the examination of the books of the common carrier alone might not secure the evidence required, the unannounced, simultaneous examination of the affairs of transportation companies and of shipping corporations would undoubtedly bring to light all violations of the anti-rebate and discriminatory laws.

In addition to providing the government with means of obtaining evidence of the violations of law, this plan of publicity would, in a large measure, do away with dishonesty in promotion, over-capitalization, misleading and untrue financial statements and corrupt management of corporations, the principal evils existing in American corporate life.

Would it not be wiser to first experiment with the use of federal light before adopting remedies fraught with such dangerous consequences as those now being considered by the Congress? If this plan of federal incorporation and inspection does not furnish the relief contemplated, the changed conditions resulting therefrom would undoubtedly suggest a remedy, possibly not so extreme and drastic as the remedies advanced today.

National Conference on Trusts and Combinations, Proceedings. 1907. pp. 351-63.

Federal Incorporation. Henry W. Palmer.

Complaint is made that certain combinations of capital in the form of corporations chartered by different states and extensively engaged in transacting the manufacturing business of the country are exceeding their privileges by seeking a monopoly of the markets and that the means used to effect this result are restraint of trade by various means and destruction of competition by destroying competitors.

It may be admitted that there is ground for complaint. The heavy hand of the so-called trusts has been laid upon individuals in all parts of the country, and the wail of the injured has arisen from every point of the compass.

Remedies may be proposed more or less effectual. They are generally repressive measures calculated to restrain the alleged evils growing out of this great and unusual industrial development.

Anyone capable of comprehending the legal and economic relations of the subject cannot fail to be impressed with the manifold difficulties that beset the path of the law makers at every step.

The dual nature of the government; the fact that the corporations called trusts are creations of the sovereign states and are mainly engaged in lawful business; that the power of Congress is inexorably limited by the grants of the Constitution, which as construed and defined by the Supreme Court forbids interference with manufacturing within a state; that a large part of the business of the country is now carried on by the so-called trusts and that their destruction or serious disturbance would involve loss of employment to millions of workmen, destruction to billions of value held by honest investors, and general conditions of general bankruptcy to the most prosperous people and nation of the earth, are all properly and necessarily to be considered by wise and prudent men who wish to do good and not evil.

One of the methods that is suggested by which the corporations may be brought under federal control is to grant them federal charters.

Can Congress Charter Corporations?

The first inquiry is, has Congress the right, under the powers by the Constitution to regulate commerce, to charter business corporations for the purpose of manufacturing and selling goods which enter interstate and foreign commerce?

Second, if the power exists to incorporate such companies, would its exercise be expedient and beneficial to the people?

Reference to what has been done by Congress may assist in determining what may be done.

Under the authority to regulate commerce, the Act of 1890, commonly called the Sherman act, was passed. This act is entitled, "an Act to protect trade and commerce against unlawful restraints and monopolies."

By its terms every contract in restraint of trade or commerce among the states is declared illegal, and every person making such a contract is guilty of a misdemeanor, punishable by a fine or imprisonment.

The United States courts are invested with jurisdiction to enforce the act and the district attorneys directed to institute proceedings under the direction of the Attorney-General to enforce the act. The broadest powers are given to the courts to bring nonresidents within the jurisdiction from any part of the United States or the territories, when necessary. Property owned under any such illegal contract while in transportation from one state to another shall be seized, condemned and forfeited to the United States. Any person injured by any such contract, trust or corporation shall have the right to sue in any United States court when the defendant can be found within its jurisdiction, without respect to the amount in controversy, and may receive three times the actual damage. The word "person" in the act includes all corporations and associations existing with or without the authority of the laws of the states.

This act pays no respect to state lines or state laws. Corporate rights obtained under charters from sovereign states are not considered. The vast bulk of goods and property which enter into interstate commerce are swept within the grasp and control of federal law and made subject to the jurisdiction of the federal court. Such property may be seized, condemned and confiscated by the United States without respect to who owns or where made or to whom consigned. The rights of citizens of states, enjoyed since the foundation of the states, to be tried in the courts of their domicile is taken away and a citizen of South Carolina may be summoned before a United States court in Maine, and there by due process of law, be deprived of his liberty and property. No edict of emperor or ukase of czar can be found more drastic or sweeping in severity of penalty or facility for enforcement. The full power of the legal machinery of the government is placed at the disposal of the injured person. He may summon the chief law officer of the United States and his subordinates to prosecute his grievance and exact from the defendant a three-fold damage.

This law has been adjudged to be within the power of Congress under the right to regulate commerce between the states. In no less than six cases the Supreme Court of the United States has maintained and enforced the law, viz., in the case of United States vs. Knight Company, 156 U. S. 1; United States vs. Trans Missouri Freight Association, 166 U. S. 290; United States vs. Joint Traffic Association, 171 U. S. 505; United States vs. Hopkins, 171 U. S. 578; Anderson vs. United States 171 U. S. 604 and Addyston Pipe and Steel Company vs. United States, 175 U. S. 211.

Attorney General Knox summarized these cases as follows:

"In the Knight case there was involved an illegal monopoly in the production of sugar, commonly known as the 'Sugar Trust.' In the Freight Association and Joint Traffic Association cases, agreements among interstate railroads fix and maintain rates and fares; in the Hopkins and Anderson cases two live-stock exchanges, located in Kansas City, and the Addyston Pipe and Steel Company case a combination among competing shops

located in different states, and engaged in making cast-iron pipe for gas, water and sewer purposes, to control prices by suppressing competition among themselves.

"In the Knight case the court held that the creation of a monopoly in production does not necessarily and directly restrain commerce among the states. The Court drew the line between production and interstate commerce, the former being subject to the regulation of the state, the latter alone to that of Congress.

"In the Freight Association case the Court held that the anti-trust law applies to railroads, and that it prohibits all agreements in restraint of interstate commerce, whether the restraint be reasonable or unreasonable.

"This was followed by the Joint Traffic decision, the Court holding in addition that the anti-trust law is valid and constitutional, and that Congress has the power to say that a contract shall not be lawful which restrains trade or commerce among several states by stifling competition.

"In the Hopkins case it was held that the business of the members of the Kansas City Live Stock Exchange was not interstate commerce within the meaning of the anti-trust law, and therefore the agreement creating the Exchange did not operate to restrain trade or commerce within the several states.

"In the Anderson case the Court took the view that whether the members of the Traders' Live Stock Exchange of Kansas City were or were not engaged in interstate commerce, the agreement creating the exchange was not one in restraint of such trade.

"In the Addyston Pipe Company case the Court held that Congress may prohibit the performance of any contract between individuals or corporations where the natural and direct effect is to regulate or restrain interstate commerce, and that a combination among formerly competing shops, which directly restrained not simply the manufacture but the sale of a commodity among the several states. comes within the anti-trust law."

The question whether Congress has plenary power over goods and property that enter into interstate commerce is therefore

settled, and it is settled also that whoever engages in such commerce must do it subject to the rules and regulations provided by federal laws.

The Congress of the United States has also exercised the power to grant federal charters to carry on the business of banking in the states under which the sovereign power of the states to impose taxes has been limited; to construct railroads across the territories of states without their consent; to condemn land within the states in order to carry out the purposes of the powers vested in the government by the Constitution, and to incorporate trades unions, with authority to exist in any and all states, and to hold such land as may be necessary for their business.

Steps Already Taken in Regulation of Commerce

In the execution of the power to regulate commerce, Congress has established ports of entry and delivery, divided the coast into collection districts, granted coasting licenses, excluded foreign built vessels from the coasting trade, expended money in surveying, sounding and charting navigable rivers, cleaning out and improving channels, established custom houses, warehouses, scales, etc.; erected lighthouses, stationed light ships, denied the power of the states to tax freight transported from state to state or to discriminate against owners of goods brought into a state for sale, or to exact a license from persons dealing in foreign goods. Congress has taken private property in the exercise of the power to regulate commerce (148 U. S. 312), constructed railroads across states and territories, exercised right of eminent domain and regulated fares and freights. (California vs. Central Pacific, 127 U. S.)

The Corporation an Instrumentality of Commerce

Among the instrumentalities by which commerce is carried on and without which it cannot be successfully conducted, are corporations. May Congress create a necessary instrumentality by which and through which commerce may be conducted, viz., a corporation? The corporations now existing, except the Pa-

cific railroads, engaged in the business of interstate commerce are creatures of the states. The right to exist depends on state laws. Beyond the borders of the state of its paternity a corporation exists and does business only by permission of the sovereignty which it enters. By comity alone, not by right, the corporations of the several states transact business outside the state of their creation.

. No state has the right to exclude from its borders the trade of interstate commerce, although it may exclude a foreign corporation from entering. The original package may go everywhere, despite state laws. The agent negotiating the sale of goods, the subject of interstate commerce cannot be excluded from a state by the imposition of license fees imposed under the taxing power.

Both agents and goods must be admitted. So much has already been decided. Then why may not Congress authorize an agency in the form of a business corporation organized under federal law to do business in any state or territory, if deemed necessary or useful to effectuate the purpose in view when the power to regulate commerce was conferred? Of the necessity, Congress must be the sole judge. If the power exists the time and circumstance must rest in Congress. Legislative discretion is not removable by any court.

Is Federal Incorporation Expedient?

If the power exists would it be expedient and beneficial to the people to incorporate such companies?

Let the probable objections be considered.

First. Interference with the business of granting charters by the states.

Second. Federal control over such corporations would involve incidental control, and to some extent of the business of inter-state corporations.

As to the first objection the right of the state to grant charters would not be affected. The financial injury that might result would be determined by the number of corporations that might seek federal instead of state charters. The right

to equally tax tangible property of such corporations doing business in a state would remain. Nothing would be lost but the power to tax the franchise. The extent of the financial injury that such an act would inflict is purely conjectural and not worth considering. What the states lost in that respect the United States would gain, and the people of each state would be proportionately benefited.

As to the second objection, no doubt there is a wide difference of opinion on the question of the expediency of any interference by the government with the business of the country in any way, and no thoughtful person will contend that there is not good reason for such difference. Theoretically the functions of the government are fully performed when the people are protected in their rights of life, liberty, reputation and the pursuit of happiness. Practically, as the conditions change, and a nation emerges from a pastoral and bucolic state and engages extensively in manufacturing, transporting and selling goods in the markets of the world, when nearly all the active business passes out of the hands of individuals and into the control of corporations, upon the success of which a large proportion of the people are dependent for an opportunity to earn a living, and upon which in a large measure the general prosperity and happiness depend, when the power and influence of such corporate bodies become great enough to exercise influence over the people's government in the great executive, legislative and judicial departments, we may at least be brought to consider whether the right of the individual to life, liberty, and the pursuit of happiness will not be best conserved by laying a regulating hand on the instrumentalities of trade, commerce and manufacture, and by controlling any disposition on their part to usurp the functions of government, to monopolize the production and sale of the necessaries of life, or to unfairly use their power to hamper and destroy the competition of individuals.

Supervision Necessary and State Laws Inadaquate

Assuming that no sane persons desire the destruction of the business corporations of the United States, large or small, the

question is whether, under the present conditions, in view of the fact that they are necessary to the prosperity of the people, they should not be brought under some authority that can keep them in subjection and within the sphere of their rights. The power of the states is confessedly and notoriously inadequate. The federal government is alone able to successfully undertake the task.

After all, this is a government of the people; the Congress is their Congress. That there is an almost universal demand for some kind of restraint upon the vast aggregations of capital that have lately sprung into existence is evidence that such restraint is needed. Some of the clamor is no doubt born of hatred of success and envy of prosperity; some comes from those who believe property a crime and its owners criminals; some comes from people who have very positive opinions, but who never think; but far more is based upon a reasonable apprehension that combinations in restraint of trade have been formed: that corporations that intend to monopolize the production and sale of at least some of the necessaries of life do exist, and well organized and successful efforts have been made by them to ruin competitors and destroy competition.

If all of these apprehensions are not well founded; if all the trusts are honestly pursuing lawful business in a lawful way, no act of Congress that is likely to be passed will disturb them or make them afraid.

Advantages of Federal Charters

If corporations engaged in interstate commerce do not desire incorporation under federal charters, they cannot be compelled to take them out. If, on the other hand such corporations, in order to escape the limitations, exactions and annoyances imposed upon them by the states, are willing to submit themselves to the control of Congress, the opportunity would be given if a general federal incorporation act could be enacted. If corporations engaged in interstate commerce accepted federal charters, the question of adequate and proper regulation and control would be vastly simplified.

The experience of the greatest manufacturing and commercial country in the world ought to be of value in seeking a solution of the question as to the methods by which corporations may be safely created and the extent of the power that may be properly intrusted to them.

The English Companies Act, passed originally in 1882, and amended in 1886 and 1890, furnishes the methods by which practically all corporations, except banks, may be incorporated. Under this law persons desiring to form a corporation may file a statement in the office of the registrar, setting forth minutely and in detail the kind, value and location of their property, the amount of capital stock, the number of shares into which it is divided, the names of the directors and shareholders and the nature of the business intended to be carried on, and the kind of liability assumed by the directors and shareholders.

Several kinds of business may be conducted by the same company; there is no limit to the number of kinds. The amount of capital or number of shares is unrestricted. Once formed the corporation may do business anywhere in the British Empire. New Jersey is not more liberal than Great Britain in granting charters of incorporation. The vast experience of this great manufacturing nation has eventually wrought the conclusion that the instrumentalities of business should be freely granted and as little hampered by vexatious conditions as possible. Always retaining the right to knowledge of the property and purposes of corporations, and reserving such supervision as will enable creditors to wind up and fairly distribute the assets of bankrupt concerns, the English law allows the largest liberty to carry on any kind of business at any place in the Kingdom or Empire.

Federal Corporations Imply No Hostility to Reasonable Business Enterprise

A federal charter should allow a corporation to transact business in any state or territory of the United States, subject only to such regulations as Congress might prescribe and to

such taxation as the states impose on similar business agencies chartered by themselves and no more. It may be assumed that federal control over business corporations engaged in interstate commerce would be reasonable. The debate on the pending anti-trust regulations has not developed a disposition on the part of the most ferocious enemies of trusts to do anything hurtful to honest and legitimate business enterprises. It is the dishonest and illegitimate enterprises, brought into being for the purpose of swindling the public by imposing upon it worthless stock and bonds, as well as those other combinations conceived for the purpose of monopolizing some line of business, stifling competition and restricting trade, against which indignation has properly been hurled. Perhaps the selection of concerns to be vituperated has not always been judicious, but abstractly, no one can or cares to defend the class of corporations named. The people are entitled to an honest and legitimate use of the special privileges conferred upon capital by the grant of corporate functions. They ought not to be turned into engines of oppression to competitors or of robbery of consumers.

Honest business honestly pursued need fear nothing from this or any succeeding Congress.

Outlook. 87: 19-26. September 7, 1907.

Constitution and the Corporations. Charles F. Amidon.

There never was a time when the interpretation of the Constitution required a more careful consideration of living conditions than to-day. Within the last fifty years economic forces have been introduced into our life that are as revolutionary of pre-existing conditions as the introduction of gunpowder was of the state of feudalism. Seward's statement in the debate of 1850 that "Commerce is the god of boundaries, and no man now living can tell its ultimate decree," is far more true at present than when it was uttered. When the Constitution was adopted, the unit of our social and business life was the commonwealth. With the exception of the foreign and coasting trade, the commerce and industry of each state was confined

to its own borders. The Union was political instead of industrial or commercial. To-day our industry and our commerce are national. They are made aware of state lines only by conflicting and often narrowly selfish enactments. The units of commercial and industrial organization extend to many states, often to the entire nation. Instead of being required to obey one master, business is compelled to obey many. Coincident with this enlargement of business enterprise to embrace different states, has occurred a revolution in state activity. During the first half of the nineteenth century the doctrine of *laissez-faire* was the fundamental principle of government. The state left commerce and industry to private control. To-day that is all changed. Government is now present in all lines of business. When the state regulated but little, business was not much concerned who did the regulating. But now that all governments are competing in their zeal for regulation, whether one government or many, the nation or the states, shall do the regulating, becomes a matter of paramount importance. These changed conditions in our actual life compel a reconsideration of our divided governmental authority to see what now belongs to the Nation and what to the state's authority. The problem is not the same as it was; it cannot be answered by reading history or studying precedents.

The new condition has manifested itself most conspicuously in two fields, the railway and the inter-state industrial corporation. At the beginning the railways were local. There was a time when in making a shipment of freight from New York to Buffalo at least three different bills of lading were required. Now five great systems embody more than three-fourths of the total mileage of the country, and the work of consolidation is still in progress. There are no longer state roads, but all are instruments of inter-state commerce. Actual statistics are wanting, but persons in a position to know are of the opinion that the local business of the railways does not exceed fifteen per cent of their entire traffic. In a case tried in one of our Western states a few years ago it was judicially found that the local business there involved amounted to less than three per

cent. In the face of these conditions it is impossible to maintain over common carriers the manifold control of the different states and the federal government.

There is no way in which local business can be separated from through business. The same roadbed serves both; both are carried in the same train and by the same crew. Back of every schedule of rates prescribed by government is the question, Are those rates reasonably compensatory? Under our present system that question as to state rates must be decided solely upon local business, and as to inter-state rates solely upon inter-state business. The court cannot look to the entire traffic in judging of the reasonableness of either. While it is possible to ascertain what revenue is derived from each class, it is absolutely impossible thus to distribute the cost of operation and maintenance. The evidence upon that subject is wholly speculative and conjectural, consisting entirely of opinion testimony given by parties having a vital interest in the result of the litigation. In actual operation the railways do not and cannot keep the two kinds of commerce separate. Why, then, should the law attempt to divide that which in actual life is a unit and indivisible?

Whenever a state prescribes a schedule of rates for local business, it thereby directly and necessarily regulates inter-state business as well. There can be no sudden lifts and falls at state lines. They have no relation whatever to the cost of service and can afford no justification for discrimination in rates. As the result of the schedule of rates prescribed by the state of Minnesota during the past winter, the rates on the western side of an invisible line were from twenty-five to fifty per cent higher than those on the eastern side. The railways could not maintain both these rates without discriminating against North Dakota points in a manner which would constitute a gross violation of that portion of the Inter-State Commerce Act which forbids discrimination against any locality. The necessary result of the enforcement of the local rates was to compel a reduction of all through rates. This the Supreme Court has decided is such a direct interference with inter-state commerce

as to render the action of the state void. But, further, if one state may prescribe a schedule of rates, all states may, and the inevitable result of such a practice is to place the whole body of inter-state commerce under the actual domination of state laws. In that way the authority which extends to only fifteen per cent of the business regulates the entire business. The necessary consequence is that either the Nation must take control of commerce within the states or the states will take control of commerce among the states.

The chief domestic cause for the adoption of the Constitution was to destroy the power of states over inter-state commerce. But does not their control of railways re-establish that authority? To say that states shall not regulate commerce among the states, and at the same time concede to them power to regulate the only instrumentalities by which that commerce is carried on, is to establish in practice what we deny in theory. Hitherto state regulation has been inefficient, and for that reason alone its localizing power has not become manifest. But now, through the investigations of economists and commissions, the general campaign of publicity, experience in rate litigation, the decreased influence of railways over legislative bodies, there has come a new era in governmental regulation of carriers. State authority is becoming organized, energetic, and effective. If continued, it will work its inevitable results. In commerce as in politics, state governments will represent state interests. No rivalry can surpass that of our commercial centers, and the states in which they are located, let their power over carriers become effective, will exercise that power in support of their own cities. This is not theory. Only recently the Commission of one of our most aggressive Western states warned the railways by a written communication that if they were not more considerate of the state as to inter-state rates, the commission would retaliate by the exercise of its powers over local affairs. Other commissions, while not thus frank in their avowals, have been equally local in their practices. The severest critic of railways cannot deny that their policy has been splendidly national, and the most potent single factor in

the creation of our vast domestic commerce. In thus maintaining the commercial supremacy of the nation, they have been compelled to withstand the importunities and fierce wrath of local interests. Now, however, the conflict is to be transferred from this field of economics to the field of government. Localism is to speak, not by petition, but by statute. Under this régime, as governmental control increases in efficiency, the irrepressible conflict between local and national interests will increase in directness as well as in the frequency of its exhibition and the intensity of the passions aroused. It has already brought us to the verge of civil war in North Carolina, and been the occasion of the sharpest acrimony in other states. Such a conflict must in the end result in the complete supremacy of one authority or the other.

It is vain to appeal to states, as did Secretary Root in his New York address, to subordinate local advantage to the general welfare. Our whole history is a confirmation of the statement of Mr. Pinckney, in the Constitutional Convention, that "States pursue their interests with less scruple than individuals." They exhibit all that lack of conscience characteristic of those who exercise delegated power. As Justice Miller points out in his lectures on the Constitution, had it not been for the dominant authority of the central government, the general welfare would have been as completely sacrificed to local selfishness under the Constitution as it was under the Articles of Confederation. What states require is not exhortation but authority.

The situation in the field of industry presents the same general features. To abolish local control over matters extending outside of the state was the origin not only of the article conferring power on the national government to regulate commerce among the states, but also of those provisions which forbid states to lay imposts or duties on exports or imports, and which secure to the citizens of each state the privileges and immunities of citizens of the several states. These restrictions were placed in the Constitution not so much that men might be free as that national commerce and industry might be free. They have been largely nullified in actual life by the fact that

business is now carried on by corporations instead of persons. When the Constitution was adopted, only twenty-one corporations had been formed in the United States. These were mainly for the construction of canals and turnpikes. There were but one bank and two trading companies. As business agencies corporations had no part either in life or thought; consequently they had no place in the Constitution. The Supreme Court has held that they are not citizens within the meaning of the Fifth Amendment, and that each state may either wholly exclude them, or impose as conditions of their entering or remaining in the state such terms as local policy or interest may suggest. The result is that business which was intended to be free has, in fact, become subject to local authority. The abuses of corporate organization and management have heretofore commended this exercise of local control. Ultimately, however, we shall become increasingly aware of its injustice and folly. Business cannot be conducted in this century except through the agency of corporations; but the very enlargement of that agency has caused industry, the same as commerce, to overleap the bounds of states, and thus become subject to governments whose only interest in them is that of the publican. "Federal," "National," "Union," "United States," "International," "American," these terms find a place in the names of the corporations that are carrying on our large business enterprises, and are not mere high-sounding titles, but are truly indicative of the scope of the business conducted. They have taken national titles because their business is national and international. While engaged in the preparation of this paper I employed three young men in different libraries to examine and summarize state laws passed since 1890, directed against foreign corporations solely upon the ground of their alienage. My purpose was to institute a comparison between laws of that character now in force, and discriminatory statutes passed by the several states under the Articles of Confederation. But the mass of material turned in by these investigators was so great as to surpass any leisure at my command for its study and classification. The reports, however, leave no room for doubt that the laws now in force

are both more vicious in character and varied in form than were those of the earlier period. At that time discrimination was confined in the main to taxation by states having ports of entry against those which had them not. To-day they embrace not only double and frequently manifold taxation, but the thousand forms of regulation which recent governmental activity in the field of business has developed. A condition which was then deemed sufficient to cause the framing and adopting of the Constitution ought now to be adequate to compel the exercise of the power which the Constitution vested in the Federal government for the very purpose of controlling such conditions.

How far may the national government go in the control of those matters which have become in fact national? The situation fits exactly the terms of the resolution passed in the convention that framed the Constitution, which was the source of all the powers and restrictions embodied in that instrument. It presents a case "to which the separate states are incompetent and in which the harmony of the United States may be interrupted by the exercise of individual legislation." As to railways, there is no more reason why they should be subject to a divided authority than there is in the case of navigation. There will, of course, be in the one case, as in the other, local matters that can be best dealt with by local authority. But as to all that affects them as commercial agencies, whether that commerce be local or inter-state, the railway is a unit; its activities are national, and it ought to be subject solely to national authority. Divided control is inefficient in protecting the public, and grossly unjust in the burdens which it places upon the carrier. During the last winter there were passed in the states west of the Mississippi river one hundred and seventy-eight statues dealing directly with transportation and its instrumentalities. The number of such statutes now in force throughout the entire country extends well into the thousands. They are conflicting, oppressive, inefficient. They seldom represent intelligent investigation, but in the main have had their origin in agitation, often in popular frenzy. State legislatures have

not yet learned that due process of legislation, like due process of law, proceeds upon inquiry, and legislates only after hearing. Protection to the public and justice to the carrier alike unite in the demand for a single governmental control. The power under the commerce clause of the Constitution is plain. The decisions of the Supreme Court have placed that subject beyond the realm of controversy. If the railway as an instrument of commerce can only be dealt with justly and efficiently by a single authority, the federal government may assert and maintain its exclusive jurisdiction. Regulation is now inefficient because divided. If the federal government shall take exclusve control, it will then be responsible alone for such a control as shall be both efficient and just. Public opinion will have a single point for its direction, and will not be dissipated among many conflicting authorities. The subject does not demand separate rules for the separate states. Their action refutes such a doctrine. By the legislation of the past winter Virginia and Ohio, Pennsylvania and Minnesota, are combined in the same passenger rate, though they vary as five to one in density of population and travel. The subject is national, and the federal government with its national outlook can, by organized investigation and accumulated experience, best acquire the skill and knowledge necessary for its just and efficient regulation.

As to inter-state industrial corporations, the subject is of much more recent development, and the necessity for federal control is less urgent. It may well happen that many of the abuses in this field will disappear with the abolition of rebates and the other special privileges which such corporations have enjoyed at the hands of carriers. The evil arising from hostile state enactments may be remedied by a change of emphasis on this subject in the decisions of the Supreme Court. Heretofore that tribunal has been governed in such cases solely by a consideration of the nature of the corporate being. But the present tendency in corporate law is to look at rights rather than the nature of the being possessing them, and if the court shall adopt that view, it may yet hold that alienage alone is

not a proper basis for discriminatory legislation; that legislation based solely upon that ground constitutes a denial of the equal protection of the laws. The late case of American Smelting Company *versus* Colorado affords encouragement to expect such a change.

If, however, federal control shall be found necessary to correct the evils and protect the rights of inter-state industrial corporations, authority for its exercise exists in the commerce clause of the Constitution as already interpreted. It has been decided by the highest court that "the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions as are found in the Constitution of the United States." That court has also held that, as a means of executing this authority, Congress may create corporations for the purpose of carrying on inter-state commerce. One branch of that commerce is traffic or exchange among the several states; and if national corporations may be created for the purpose of carrying on that branch of inter-state commerce which consists of transportation, as was done in the case of the Pacific Railroads, the same method may be adopted as to the other branch of inter-state commerce which consists of traffic and exchange. Can a corporation created for this purpose be also authorized to produce the articles in which it deals? In thought manufacture and commerce may be separated, but in business the former is always combined with the latter. No one ever manufactured except for the purpose of sale. Under the present régime of wide markets, large sales, and small profits, commerce has become the paramount feature even of manufacturing enterprises. The incidental powers which Congress may confer upon a corporation created for federal purposes were clearly defined in the litigation arising out of the United States banks. There the federal feature was the collecting and disbursing of the national revenue. But to accomplish this result a corporation was created, authorized to do a general banking business and to establish branches for that purpose in the several states. Of the actual

business transacted, the federal feature, though of capital importance to the nation, was a subordinate function of the corporation as a business concern. The opposition of the states was largely grounded upon this consideration. It was denied that they were federal agents. A resolution by the Legislature of Ohio put the matter plainly: "We resist the shaving shops of a club of foreigners located among us without our consent." But the power of the federal government to create the bank and to exempt it from all local authority as to its entire business was vindicated in the fullest measure. Under the National Bank Act this authority has been carried much further. Usury and its consequences have been defined, and all state criminal statutes affecting the transactions of these banks, or their agents or officers, have been held null and void. Now apply these well-established doctrines to corporations created for the purpose of carrying on that branch of inter-state commerce which consists of traffic and exchange. Would they not fully sustain the authority of Congress to confer upon such corporations manufacturing as well as commercial powers? Would not the commercial activities of such a corporation which confessedly fall within the scope of the commerce clause of the Constitution greatly surpass in importance the functions of the United States bank, which consisted in collecting and disbursing the public revenue? And if a bank created for that subordinate federal function might be given the power of carrying on a general banking business, why could not a corporation created for the purpose of carrying on inter-state commerce, which would be a capital feature of its business, be at the same time authorized to produce, either in whole or in part, the articles which it applied to that commerce? It is said that *carrying on* inter-state commerce is not the exercise of a federal power, as was the collection and disbursement of the public revenue, and that is conceded; but *regulating* inter-state commerce is a federal power, and a corporation created as a means of such regulation may be freed from all state action that will interfere with the purpose of its creation. Surely if Congress, as a means of regulating inter-state commerce, may create cor-

porations to carry it on, it may endow them with all such powers as are fairly conducive to their success as business concerns, judged by the usual activities of corporations engaged in such commerce.

Our great corporations are now national in their character, and national and international in the scope of their operations. To regulate their formation is one of the most direct and efficient means of regulating their activities. For forty-five states to create corporations and the national government to regulate their most important business cannot fail to result in inefficiency and conflict. Hitherto interests to be regulated have found advantage in the dual form of authority. It has enabled them to assert, whenever either authority attempted their regulation, that the power properly belonged to the other authority. We have now arrived at a state of knowledge and publicity which makes this kind of shuffling impossible. The nature of the subject to be regulated and not the shifting desires of the interests concerned must determine the place of authority.

Our first great economic conflict between the states and the nation was waged over the subject of banking and finance. No sooner were we started under the Constitution than the need of a national agency in that field was discovered. But the local jealousy of the states prevented its establishment for more than seventy-five years. During that period we were subject to all the injury and confusion of wildcat banking under state authority. Banking and finance, however, were not more national at that time than commerce and industry have now become, and the same conflict is again presented in this new field. We can get along with divided authority to-day on these subjects, just as we got along with state bank notes. This nation can stand almost anything. But it is the duty of government, in the exercise of its power, to create conditions which are not simply tolerable, but those which are most conducive to the general welfare. A uniform authority in the field of inter-state commerce and industry will be found as beneficent to-day as it was discovered to be in the field of finance and banking as the result of our first economic conflict. The prob-

lem of regulating these affairs has attained its present magnitude largely because the federal government has neglected to exercise its constitutional power over the subject in the course of its development. Until the Inter-State Commerce Act was passed in 1887, the negative power of the courts was the only federal control. Even by them till 1886 the states were sustained in their authority over inter-state as well as domestic rates of carriers. The truth is that the national government has so long neglected its powers under the commerce clause of the Constitution that now, when it tardily takes up its duties, it is charged by the states with usurpation.

The political revolution of 1776 required the creation of a central political power because it gave rise to great political concerns that could not be provided for by the several states. To-day, as the result of an economic revolution quite as fundamental and far-reaching, there are certain great business interests that have become national in their character and extent which cannot be left to conflicting state authority. It is as unwise to stand timidly shrinking from the exercise of economic control now as it would have been a century ago to hold back from the exercise of political power through the fears of those who dreaded an adequate national government. We ought to look squarely at the nature and extent of our commerce and industry. Are they national? Ought they to be regulated by one or by fifty different sovereignties? If in their nature and extent they are national, and, in justice to the public and the interests to be regulated, ought to be subject to a single authority, then we ought not to hold back from the exercise of the necessary power simply because it would add to the activities of the federal government. We cannot refrain from the exercise of necessary powers upon the ground that the federal government cannot perform the work wisely and efficiently without confessing that that government is inadequate to perform the duties which the nature of things and the Constitution alike devolve upon it. If national industry and commerce ought not to be subject to the jealousies and local interests of the several states, there is no alternative but to devolve their regulation

upon the federal government. Between these two forms of regulation we must make our choice. The election is not between national regulation and some ideally perfect scheme; it lies between the single authority of the nation and the anarchy of the different states in combination with partial national control. The way, the duty, and the power are plain. Unless domestic conditions, such as in 1788 compelled the framing and adoption of the Constitution, shall be impotent to compel the exercise of those powers granted by it in order that things which are national in their nature and extent may be controlled by national authority, there must be such an extension, not of Constitutional power, but of the exercise of national powers already conferred, as shall bring national commerce and industry under the single authority of the federal government.

One hundred years ago those who opposed the adoption of the Constitution made "Consolidation" their cry of alarm. To-day those who oppose the control by the national government of the business affairs that have become national raise the cry of "Centralization." The one cry is as foolish as the other. On both occasions the opposition is guilty of that highest political folly which consists in hanging to a theory regardless of changed conditions in life. Centralization has already taken place out there in the world of commerce and industry. The only question remaining is, Shall the government take cognizance of the fact?

United States. Industrial Commission. Reports. Vol. XIX. pp. 686-711.

Opinion of F. J. Stimson.

Recourse in all instances would be given to the federal courts. I think it therefore important to point out that any such measure as this would be the most radical and the most revolutionary—I do not use the word in a bad sense necessarily—legislation ever passed in this country, with the exception of that which was the result of the Civil War. The notion of "State Rights," what remains of it, would be riddled. Ninety percent of the business of the people would be taken from the control of

their own states and their own courts and put under the control of the federal government. For in regulating these federal corporations Congress would control not only their relations with sellers and buyers, with their creditors and stockholders, but with the labor they employed national eight hour laws would become possible without constitutional amendment.

Mr. Phillips. In regard to the judicial system. Would it not require the expansion of the federal courts?

Mr. Stimson. They would have to be expanded enormously. In our state the lawyers dislike the federal courts. Every lawyer in Massachusetts will stay as long as he possibly can in the state courts because the state courts have always been better. They are much more speedy, and they have usually as good judges and better juries. In the west I have found in my own experience that the contrary is true. I know of states where if your case is a sound one you go into the federal in preference to the state courts, but that is not the case in New England. You would have to more than double the number of federal judges if this legislation is to be effective,

If you look through the dockets of the courts today—the important cases that come into the equity courts—I do not believe there is more than one case in ten where neither party to the case is a corporation. Of course I am not talking about the personal injury cases and that sort of thing, which are usually the cases that are now brought in our common-law courts, though these are usually brought against corporations for damages to persons or property. The important cases with us are the equity cases. Those are the cases which concern large amounts of property; and I predict you will find much more than half the cases have a corporation as either plaintiff or defendant.

Under this legislation, not at the start but at the end—we are bound to contemplate the end in considering it—the great bulk of these cases would go into the federal courts. I believe, roughly speaking, you would be taking away half the business from the state courts and putting it into the federal courts.

Certain advantages would result. You would get a uni-

form series of decisions. You would get rid of the conflict of law that now exists between the states.

Representative Gardner. What would be the effect in the way of cases that would be taken to the Supreme Court? There is a disposition on the part of all powerful persons and corporations to carry cases to the courts of last resort. Suppose one-half the present business were turned into the federal courts, and the same proportion as now were carried to the court of last resort?

Mr. Stimson. As a matter of fact you only get to the Supreme Court in a limited number of cases. You never get to the Supreme Court in ordinary cases. You stop at the Circuit Court of Appeals. That court would have to have a greatly increased number of judges. On the other hand, the advantage would come in, which I have already mentioned, that the decisions would be uniform or consistent, and so far as the court decided them for the whole country, would be an absolute precedent for all other cases. So that, ultimately, I am inclined to think litigation would diminish.

North American. 175: 877-94. December, 1902.

President Roosevelt and "the Trusts." Joseph S. Auerbach.

Since the decision of the Supreme Court of the United States as to the constitutionality of the Act of Congress incorporating the Bank of the United States, it is accepted law that Congress can, in aid of governmental functions, create a corporation for the purpose of engaging in foreign or interstate commerce. Chief-Justice Marshall, in the United States Bank case, rested this power of Congress upon the authority of the Constitution, which, after enumerating specific powers, among them the power to regulate commerce between the states and with the foreign countries, empowers Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Later expressions of the United States Supreme Court have not departed from this view; they have enlarged it.

Congress being authorized, therefore, to create corporations in aid of inter-state commerce, it is believed that it can likewise pass a general act under which corporations engaged in inter-state commerce may be incorporated. The subject cannot be said to be free from doubt, but after a careful review of the decisions of the Supreme Court of the United States it is our judgment that such an act, if confined in its purpose to inter-state commerce and its reasonably necessary incidents, could be so drawn as to be constitutional. And by these incidents we mean to be understood to go so far as to include the conduct or control by such corporations of the buying and selling and manufacture legitimately connected with their corporate objects.

Such an act would require that corporations availing of its privileges should from time to time make public certain information deemed for the public good. Incorporation under such act would, of course, be permissory, not compulsory; but, in consideration of the manifest advantages of incorporation under a national act, it is probable that new corporations would avail themselves of the privileges offered, even though with the benefits of the act there were associated this requirement of publicity, and, perhaps, other requirements. Existing corporations, even, might reincorporate under the act.

Such an act, to accomplish its purpose, must be fair and liberal, drawn upon the lines of the most enlightened thought concerning corporations. While it is not necessary that it should go as far in conferring powers as the Companies Acts of England, still it should meet the requirement of modern corporate business.

To bring about substantial results, the act proposed must be drawn with a deliberate intent to adapt corporate forms to the transaction of commercial business, and with a full knowledge of the requirements of commerce as well as the technical structure of a corporation. Such an act should not be drawn without consultation with practising lawyers, who know the needs of their clients, and who can at least be as much depended upon as the average legislator to give due heed to the public welfare.

Perhaps the appointment of Congress of a commission for the framing of such legislation might not be inapproriate. On such a commission, in addition to members of Congress, might be representatives from chambers of commerce, practising lawyers, eminent judges. It is not impossible that among the representatives of organized labor might be found those able to render valuable public service on such a commission.

Where a corporation organized under such an act of Congress is engaged in inter-state commerce, the states would be powerless to make any injurious regulation concerning it, and the right of a state to prohibit such corporations from doing business within its borders could be distinctly limited.

While it is true that many of the states have made provision by statute whereby corporations of other states, on compliance with prescribed terms, are entitled to carry on business within their borders, yet there are objectionable limitations and conditions in some of those statutes, construed at times by even ministerial officers. Not a little embarrassment has thus resulted, and the conduct of business and the ownership of property by these large corporations are not always under favorable conditions.

Not only could such restrictive statutes, in large part, be made nugatory, but it is reasonable to suppose that the broadest comity of the states would be expressed toward corporations organized under a national act.

The United States courts could be given jurisdiction of all actions by and against such corporations, and, as occasions arose, their reorganization could more easily be effected, for only United States courts are fitted by wide experience and effectiveness of their decrees to deal with such an emergency.

Uniform taxation could be provided for.

There could be uniformity, too, of liability of directors, capable of being enforced by prompt and well-defined procedure in the courts of the United States. Along with all reasonable publicity, other reasonable requirements also could be provided for.

The securities of such corporations might well furnish a more attractive investment to the public than the securities of state corporations, and the more general such an investment should become, the closer would be the relations of producer and consumer, and the less the likelihood of hostility between them.

Though by no means all, these are among the results to be looked for from a judicious act of Congress. Assuming that such an act can be so drawn as to be constitutional, and that it will be availed of by men having in hand large commercial enterprises—and both these assumptions are quite as reasonable as that a constitutional amendment of the kind proposed, even if it could be brought about, would have the desired effect—then we shall secure publicity, which seems to be the chief object of the constitutional amendment. And we should secure a good deal besides.

The whole theory of our nicely balanced control of state and inter-state commerce ought, with the exercise of only reasonable comity by the states, to be worked out in practice under such an act, not after long years, by sweeping changes or at best by doubtful expedients, but promptly, by reason of and not in spite of the Constitution. Lastly the result will come without coercion.

Chicago Conference on Trusts. 1900. pp. 276-85.

Public and the Trusts. George Gunton.

It might be well for Congress to enact a law empowering the government to grant national charters to corporations, which should give them the right to do business over the entire territory of the United States, against which no state should have the right to interfere. This would be economic, in that it would give the market of the entire country to every business enterprise. National charters could have the proper qualifications subjecting the corporations to a certain supervision and compelling annual reports to be made. Second, it might also be

provided that companies using a public franchise, like railroads, should not be permitted to make uneconomic discriminations in their rates of traffic, that they should be subject to public accounting, and that all contracts with shippers should be accessible to all other shippers. The general influence of publicity and inspection by the national government, coupled with the corporation's protection in its right to do business throughout the United States, would tend to create a wholesome influence around corporate conduct. While affording corporations the full support of the national government in their business rights, it would free them from the petty uneconomic nagging of partisan legislation in the different states. It would carry out the true idea of protection—that the American market should be open to every American producer and that the interests of the laborers and the public is safeguarded by the national government; at the same time leaving the essential features of business to be determined by the free action of economic forces, which are more permanent, more sure and more equitable than the wisest statutory enactment would ever be.

Moody's Magazine. 1: 401-7. March, 1906.

Industrial Corporations. John Bascom.

Hitherto the creation and the control of corporations have rested chiefly with the states. This method has never fully provided for the public safety, and has favored the growth of some obvious evils. The several states can, when no interested motives enter into the problem, rival and stimulate each other in dealing with difficult legislative questions. If, however, there is some special gain to be secured, the case is much altered. Laws of incorporation may be so framed as to give to a single state an advantage over neighboring states by drawing to itself the fees incident to this form of business. New Jersey is the most familiar, but by no means the exclusive, example of this policy. The laws of New York are heavier in their charges and more exacting in their regulations than those of New Jersey. The result is that New Jersey secures an income by granting

corporate powers which are to be chiefly exercised in New York and other states. The states thus lose the control, in whole or in part, of corporations most directly associated with their own territory. There is a motive given to smaller states, states less active in commerce, to underbid other states and draw to themselves advantages which do not properly belong to them. Not only does this emulation in evil arise between the weaker states; it reacts on the stronger states, as recently in Massachusetts, to induce them to so soften the conditions of incorporation as to win back their own business. Not only is progress in legislation thus arrested, a counter movement sets in difficult to be resisted. States compete with each other in a shrewd relaxation of law. A narrow temper of irresponsibility is thus associated with the very birth of corporations. A feeling has prevailed in most of the states in favor of general laws of incorporation, as opposed to special acts, as less exposed to excess and to corruption, and as making the path open to all and the same for all. Connecticut retains the practice of special acts, and thus plays into the hands of those who wish special favors.

The time would seem to have come in which the legislation which now suffers so much from a division of purpose in those who exercise it should be placed in one supreme authority, an authority whose power and interests are commensurate with the territory involved. Interstate commerce is committed by the Constitution to the federal government. Corporations whose activity is confined to no one state constitute a most important constituent in interstate commerce. We cannot deal with that commerce, readily and successfully without defining the powers of the agencies chiefly involved. If, at the time in which the Constitution was framed, corporations had played anything like the role that now falls to them, we should doubtless have had in the Constitution some distinct recognition of the relation. Commerce between the states was, in that period, but a fraction of what it now is. State lines have long since ceased to be significant in this connection, and commerce rolls over them without a jar. There could hardly be a plainer and more necessary implication than that which makes the definition of corporate powers, to be exercised in all the states, a function of the general

government. The Constitution specifies bankruptcy as a subject of federal legislation; yet the laws which control the conditions under which bankrupt estates are settled are of small importance compared with those which govern the most constant and efficient agents in commerce.

A corporation is a legal entity or personality of the most formidable kind in commercial affairs. It belongs to the federal goverment to define citizenship, and no little confusion has arisen from allowing the states to be partakers in this authority. The creation of the larger personalities represented in corporations is of more practical moment than giving citizenship to any one man or withholding it from him.

Congress has virtually entered this field by its legislation against trusts. The power to define and punish wrong action in connection with corporations presupposes the power to define right action. The only adequate government of corporations is found in the laws which create them. The growth of statute law in connection with corporations should come in direct connection with the organic law which establishes them. When the general government enters the field of restraint, it should be prepared to take complete possession of it. An example of the inevitable growth of federal authority, when it lies in the same field with state authority, is seen in the laws which guard our ports against infectious diseases. No sooner does an urgent case arise than the state, whose safety is most directly involved, wishes the more adequate resources of the United States should be brought to its relief.

The advantages of this exclusive control of the federal government are obvious. Uniformity in conferring privileges and unity in dealing with these beneficiaries would at once be attained. The powers granted and the restraints imposed would have more exclusive reference to the public welfare. Personal and local gains would fall into the background. Though we might still be without any absolute guarantee against corruption, the opportunities and motives for it would be much reduced. Fraudulent constructions of corruption might be made more difficult, and these would be launched with more publicity and under conditions more favorable to integrity. Under ex-

isting methods, the flaming announcement of opportunities for profitable investments, circulated through the mail among those wholly unable to form any sound judgment concerning them, are most safely cast into the waste-basket without perusal. There is serious loss in this state of affairs both to those who hold small amounts waiting investments, and to those who would gladly gather these sums up and put them to profitable use. While we cannot protect people in all degrees against their own ignorance, government is bound, as far as possible, to give reliable character to proffers which its own action authorizes. It belongs to civil government to settle the general conditions under which these shall alone be made and so give some basis to credit. No more open field for fraud, on the one side, and credulity, on the other, could well be devised than the present method of forming corporations. Confidence, the life blood of commerce, is flung like filthy water on the ground.

The federal government can most readily secure that complete and constant publicity which is best corrective of fraudulent designs. It can give a fixed and fitting locality to corporations, which is so essential to responsibilty and no knowledge.

Corporations should be carefully classified according to the nature of the powers conferred and the risks run. About each class should be cast the safe-guards called for. It should not be possible for the officers of insurance companies, in the possession of immense capital, to use these resources without observation under their own devices. There should be public servants whose duty it should be to see that public interests are conserved: We should not provide a police in restraint of petty offences and leave much greater ones to be committed without observation or obstruction.

The federal government can also best meet the difficulties associated with the taxation of corporations. Present methods are often inadequate and are much at variance. We have comparatively little experience, and few recognized principles, in this form of taxation. The realty, the stocks, the franchises, the good will, the bonds, the dividends that may be associated with a corporation, all come under consideration. No single state covers sufficient territory to be able to deal with all these forms

of property in a business that is intended to spread and may spread, through the entire Union. There is constant temptation for one state, in search of all the resources that fall to it, to trespass on those of other states. Stocks and bonds are widely scattered, and can only be safely approached through the books of the company which issues them. A consistent and complete system of taxation can be built up only by a government that has a full knowledge of all the interests involved. A government that aims at justice will insist on these conditions of justice.

The proceeds of such a system may be divided between the general and the local government as the claims of each shall suggest, but the first condition of equity is that all interests should be understood. While real estate comes under local obligations, the more subtle and evasive property of stocks owes much of its value to the general safety of commerce under which it arises. We are not prepared to settle this complex problem of taxation till we have the entire case before us.

The objections against federal control are for the most part traditional and inadequate. We may well watch jealously the rights of the states, and retain local government at some inconvenience; but we are also to remember that the growth of the nation necessarily carries with it an increasing unity of action. We are not to reject that guidance of local action for the sake of which the general government was formed.

Columbia Law Review. 5: 415-35. June, 1905.

National Incorporation. H. W. Chaplin.

It would not be necessary for existing state-made corporations to be dissolved. Whatever academic difficulties there might be if the question were a new one, have been dispelled. For forty years we have been carrying on practically all the deposit and discount banking business of the country under an Act of Congress pursuant to the provisions of which a state-chartered bank may transform itself, out of hand, into a national bank. Thousands of banks, practically all the important

old state-chartered banks, have so transformed themselves, with no disturbance of corporate existence or of rights or liabilities. The change has been unnoticed except in the filing of a few papers and a showing of assets and a fixing of the capitalization. In a national incorporation act, a similar provision could be made in respect of legitimate state-chartered corporations.

Current Literature. 48: 253-6. March, 1910.

Discussion of Federal Incorporation.

On the other hand, a number of men of great industrial power are quoted in favor of the bill. George W. Perkins, for instance, of the house of J. P. Morgan & Company, is reported to have said that the bill will, in his judgment, "do much to steady and render safer the development of large business interests." Ex-judge Gary, head of the United States Steel Corporation, is quoted to the same effect, and declares that if the bill becomes law his corporation will promptly and cheerfully proceed to become incorporated under it. The Philadelphia Press thinks that the financial potentates generally, while they would prefer to see nothing done, know well that some legislation is inevitable and they "prefer legislation by a conservative, constitutional, judicially minded man like President Taft to revolution in the future." "For five years past," says the same journal, "the conviction has grown upon all those dealing with trusts that a federal charter is the only effective solution of the problem offered by the need of protecting consumers without stopping growth in trade." Such a federal charter is sure to be opposed, says the same writer, just as a federal charter for national banks was opposed. The states are sure to object just as they objected to the abolishing of a state bank currency. But "simply keeping the anti-Sherman trust act on the statute book is not enough, unless the operations of corporations, organized under a new federal act, to carry on the work of the trusts, are brought under publicity, examination, supervision, and a criminal responsibility is imposed for obedience to the law by all who direct and manage them."

The Philadelphia Telegraph takes the same general view. "There is no question," it asserts, "that the people at large regard a national control of these vast capitalistic aggregations as imperative." It adds: "The impending discussions in Congress will now show us more clearly the strength and the weakness, if any, of this projected act, but it seems quite certain now that both the House and the Senate, the 'regulars' and the 'insurgents,' are in the mood to support President Taft in his determination to have an adequate supervision over all trusts, good and bad." The Hearst papers are lined up in favor of the bill. The New York American speaks of "the altogether extraordinary importance of this measure," which in some particulars, it thinks, takes an even more radical stand than was taken in Mr. Hearst's own measure to the same end several years ago. "The present session of Congress," it declares, "should understand that the passage of a federal incorporation bill is as urgent and mandatory as any other business that it has in hand." Almost the same language is used by the conservative Boston Herald. The call to Congress for action is, it thinks, more imperative from the business men than that from any other class. The federal incorporation bill, whether it be approved in detail or not, is in principle "in accord with the demand of the people and the needs of the business interests."

No more earnest argument has been made for the principle of the bill than that made by Herbert Knox Smith, commissioner of corporations, in his report a few days ago to the Secretary of Commerce. The deepest interest of this generation, Mr. Smith believes, lies in the control of its dominant commercial forces. He says:

"The issue is moral, involving deeply our American ideal of equal opportunity under the law. It is financial, and on its outcome depends the ultimate stability of our business system. The corporation has concentrated enormous commercial power in the hands of a few men. At the same time it has lessened their personal responsibility for the proper use of that power. Sense of personal obligation to the community becomes submerged in vast corporate entities. The resulting abuses call for some restraint that shall take the place of the old personal obligation. Government supervision and publicity of corporations must be that substitute. The issue is national; action by the federal gov-

ernment is imperative under its unquestioned power and duty to regulate inter-state commerce. The federal government is the only adequate authority; one of the primary motives for its creation was for a national control of national business."

It has already been proved, Mr. Smith thinks, by the experience of his own department, that a broad application of its methods is desirable. Railroads have voluntarily canceled their sweeping systems of rate discriminations, and numerous other forms of commercial oppression have been corrected. "One by one the great silent corporations are seeking public confidence by adopting a new policy of publicity." The situation is thus ready, we are assured, for the extension of the methods employed into a "complete system" of federal regulation.

NEGATIVE DISCUSSION

Green Bag. 17: 135-7. March, 1905.

Federal Regulation of Corporations: Dangerous Departure.

John E. Parsons.

It is not difficult to see that if the recommendations of Mr. Garfield's report shall become effective, the business of the country will in large measure be brought within federal control and certain consequences will result which deserve serious consideration. Our federal system is anomalous and incongruous, but there would have been no United States of America at the time the Constitution was adopted if it had not been for the compromises to which that instrument bore witness. . . . . It has resulted in so nice an adjustment between the functions which belong to the states and those which may be exercised by the general government, that in working order only occasional difficulties arise, and those up to a recent period have been capable of adjustment by decisions of the Supreme Court without serious consequences of a general character.

The proposition which is presented by Mr. Garfield's report is whether in a most essential respect all this shall be changed. It can scarcely be contended that any such outworking of the commerce clause of the Constitution could have been within the contemplation of those who framed it. It is within the recollection of every student of history that there was indisposition by the states to give up any of the sovereign rights which they claimed belonged to them. There was indisposition to subject their affairs to the power of a creation of their own, the control of which might be hostile to particular states. Such

proved to be the case with the slave states, and the sequel was a struggle which made the most important event since the formation of the government.

It was necessary, in framing the Constitution, to recognize that there would result transactions between the states, and as neither could regulate such transactions against the other, it followed that Congress must have the power to regulate interstate commerce. It may be difficult to reconcile the decisions of the Supreme Court upon the interpretation which is to be put upon the commerce provision of the Constitution. But it may be affirmed without contradiction, whatever signification may be attached to the language, that it could not have been within the intention of the framers of the Constitution that it should confer upon Congress the authority which is required to carry out Mr. Garfield's recommendations.

The question of power can be considered within the light of the Supreme Court's decisions. Innumerable points of difference which may come before that Court are suggested by the report. It may be that as to some the right of Congress to act may be sustained; that, as to others, such may not be the case. Passing the question of power, there is presented the consideration of expediency. And the slightest reflection shows that the adoption of Mr. Garfield's recommendations or the adoption of the fundmental principle upon which those recommendations go, would be to bring about a business change, the serious consequences of which it would be difficult to overestimate.

Mutual interest up to this time has led to the necessary comity between the states, the laws of each making provision for carrying on business within its borders and for the ownership of property by corporations created under the laws of the states. To bring about this situation has required time, and it has had the benefit of much practical experience. It is in working order. The new system will start afresh. It is stated in the public press that the officers of the government have already encountered difficulties in dealing with that one of Mr. Garfield's recommendations which makes compulsory federal incorporation of interstate commerce companies. If any

kind of corporate combination can come within the authority conferred by the commerce clause of the Constitution, railroads, the very vehicles of commerce, must be included. And if the authority to regulate rates which is recognized as within the right of the states to legislate about may be exercised by Congress, it would seem until the subject is carefully considered, as if it ought not to be difficult to devise the necessary federal legislation to meet that case. And yet the difficulty may be insurmountable. Important as is the railroad interest, it affects a smaller number in comparison with that which concerns manufacturing, mining and other kinds of industrial corporations. They exist to do business under every conceivable diversity, of geographical position, surroundings, interests, in fact of every essential condition. Laws relating to them fill the statute books of all the states. They are the subject of discussions before committees, of differences of opinion, in legislative bodies. They may or may not meet with executive approval. Is it possible that they can be unified into a single system, taking its authority from an act of Congress? The time of Congress is too short now to deal with the questions which necessarily come before it and to hear those who are on one side or the other of all such questions. How is time to be made for intelligent consideration of a subject which admits of such endless variety and affects such diverse interests?

And if, granting the necessary power, Congress were to attempt to act, will a state quietly acquiesce in being shorn of a power which concerns its own citizens, and which may be a source of large revenue? If Congress is to grant a license or franchise, is it to fix the fee and without limit as to amount? And is the state to be deprived of its right to impose a franchise tax? Is there to be a double tax and a double right to impose license or franchise fees? What official is to see that such reports as are called for are given, and what is to be the remedy if they are refused?

If federal officials are to be appointed to the duty, it will require a large addition to the present official staff of the government. And if the remedy, in case of a necessity for resorting to the courts, must be prosecuted before federal

tribunals, it means an addition to their already overburdened jurisdiction which it would be difficult to handle, and litigants may as well make up their minds at the beginning that it is hopeless to expect that the manifold questions which will arise can reach or be readily disposed of by the Supreme Court which already finds difficulty in keeping up with its work.

Current Literature. 48: 253-6. March, 1910.

Discussion of Federal Incorporation.

The general line of opposition to the [federal incorporation] bill is already clearly indicated. It would result, says the Baltimore Sun, in "a long advance toward the complete centralisation of power in the national government." "With the national government in complete control ultimately of all interstate commerce corporations," it continues, "there will be little left in this field for the states to do. Upon these grounds the bill will encounter opposition in Congress." The New York Press, one of the most radical papers of the country, Republican in its politics, argues strongly against the bill on the ground that to pass it would be "to take a step nearer to national socialism." Here is the way it thinks the bill would work out:

> "If any great corporate concentration of industrial power decides to accept in full good faith the Taft plan of federal regulation this is what it would have to do: First take out a federal charter, then get all the various companies now forming the combination to abandon their separate corporate existence under state or foreign charters and be merged into the new federal corporation. There would then be, for instance, only one Standard Oil Company; all the others would be wiped out and their capital and plants be transferred to a single treasury and a unified direct ownership. This would be a national trust, whose properties would be still subject to state taxation, but subject only to a limited extent to state regulation. Consolidation of this monopoly's nominally independent companies into a single federal corporation under strict supervision by the government would be almost the next thing to government ownership and operation of the oil industry."

If the charter of any corporation should become forfeited for any reason, the same paper points out, the result would be "absolute government ownership and operation" of the industry controlled by the combination. "Such an event

would bring rejoicing to the camp of Eugene V. Debs and Victor Berger. They would acclaim it as the dawn of socialism."

An attack from another point of view is made by the New York Sun. Under the present conditions any important changes in the purpose of a corporation require the consent of the stockholders as well as of the state legislature. Under the proposed measure, the charter is subject not only to repeal but to alteration "in the discretion of Congress," and "even the stockholders," says The Sun, in a shocked tone, "need not be consulted." In other words, the bill "requires every concern seeking refuge in the federal bosom to accept in blank and in advance any future amendment of the act under which it shall have incorporated," and gives to Congress power to extinguish any corporation "at pleasure." "What an inviting prospectus," remarks The Sun sarcastically, "of stability, freedom from whimsical and political interference by the legislators at Washington, and permanence of establishment for the conduct of business by the owners of the business surrendering old fashioned two-party contract rights and coming voluntarily under full federal supervision. The World would let well enough alone. At last, after twenty years, we are nearing final judgment, in the Supreme Court, on the Sherman act. Enforced even to the letter, that act, we are told, "can result in nothing more destructive than the dissolution of combinations and the breaking up of conspiracies." Why then, reverse our policy now and try a new and doubtful experiment? The World continues: "National incorporation involves almost endless disputes as to constitutional questions, expediency, administration and results. More important than all these, however, is the probability that some day it will be attended by the corruptions and disasters which a weak or a vicious man exercising too much power rarely escapes."

United States. Industrial Commission. Reports. Vol. I. pp. 1139-77.

Testimony of John R. Dos Passos.

States' rights is not a party question. It has disappeared from the realm of partisan politics, and when you are inquiring into the legality of business carried on by manufacturing corporations incorporated under state laws, and the question of restricting or limiting them, you must be warned not to encroach upon the authority of the various states; and it is very important that conscientious study should be bestowed upon this important subject before federal legislation is granted. It is unfortunately true that lately we are tending to nationalization. It is true that in great emergencies people are turning to the national government for help, for assistance, and support, but it is equally true, in my humble judgment, that such appeals should be disregarded, and that the fabric of this government never can be sustained, in its pristine vigor and glory, unless we keep the identity of the state governments perfectly established as against the federal power. And now that that great bone of contention, slavery, has disappeared, we have a chance to look at the question from an independent and unbiased standpoint, uninfluenced by sectional or partisan politics.

The question of states' rights involves the whole theory of our government and the perpetuation of our republican institutions. It is essential, in considering the subject of making laws, to endeavor at all times to maintain the individual autonomy of citizenship. We begin with the household, family and domestic affairs, and we say to the village, or town, or city, or state, whichever undertakes to invade the privacy of these relations, "You must keep your hands off." As citizen members of villages, towns, cities, or municipalities, we claim the general right to legislate for ourselves, with only so much interference from the state as is necessary for the general good of the whole people; and when we come to state citizenship we claim that the federal government has no power over us except that

which has been delegated to it by the Constitution. In any legislation inaugurated by the federal government, it is therefore essential that there should be no encroachment upon the rights of the states as they are preserved in the Constitution. In state legislation, as against municipalities, cities, towns and villages, it is equally important that the rights of these smaller communities should not be invaded, and the same reasoning applies to the invasion of individual, domestic, family or business affairs by the national or state government, or any of the minor municipalities.

Looking at the subject, therefore, in the light of every fact which I have been able to discover, I see no reason why there should be any national legislation in respect to this question of aggregated capital.

In regard to the state legislation, you are charged with suggesting a basis for homogeneity of laws upon this subject. Nothing appeals to me as strongly as that proposition. The draftsman of the act which created your commission had in view the possibility of your reaching a conclusion upon which you could not conscientiously recommend national legislation, and he has carefully given you the power to make recommendations by which homogeneity on this subject between all the states could be established—similar laws framed on the same line—the states to take up this great question and legislate in a uniform way. A recommendation emanating from this commission ought to have the profoundest weight in all the states, especially if it is acccompanied by reasoning which appeals to intellligent men.

Therefore I submit that if you recommend legislation at all, it can only be in the shape of proposals to the different states. And if it is true that any corporation in this country—I do not care which corporation it is—is in possession of franchises. or is in possession of rights, or is the holder of privileges which are not shared by other corporations or individuals, then I say if you are satisfied of that fact, level your legislation against it specifically, and do it clearly, and the people will applaud you and the courts will intelligently sustain you.

As I see the subject, without having the whole light before me as you have, sitting here patiently, as you have been, for months, and gathering in all the statistics, facts and opinions, it seems to me that the legal remedies in the various states are ample today to redress all grievances which may exist.

Chicago Conference on Trusts. 1900. pp. 462-94.

W. Bourke Cochran.

Wherever we discover corporate abuse, we find that it originates in secrecy, that it is developed in secrecy, and that it is maintained in secrecy. Special favors could never be granted in the light of day. Misrepresentations would be useless if all the facts within the knowledge of corporate officers were imparted to the public. Fraud upon corporations by the directors would never be attempted, if their operations were conducted within full view of the stockholders and of the public.

Everybody who has discussed corporate misconduct on the platform has agreed that it is encouraged by the secrecy surrounding corporate management. Surely, then, we may hope that this conference will be unanimous in recommending publicity.

What objection can there be to publicity? We are told that corporate management is private business. This certainly is not true of corporations engaged in operating public franchises. Such corporations are government agencies, and the right of the people to full information concerning the operations of public agencies cannot be questioned under a republican form of government. Corporations of every kind are created for the purpose of encouraging industry and promoting prosperity. Wherever they become engines of fraud or oppression they are perverted from their original purposes. Secrecy being the source of evil, publicity is its natural antidote. An officer of a corporation acts not for himself, but for others. Whoever acts for others will not shun publicity but court it, if his conduct be governed by honesty. The desire for secrecy is the infallible badge of fraud. The pretense that

publicity would injure the interests of stockholders is a device to plunder them. Under the cloak of secrecy stockholders have been robbed quite as extensively as the people have been oppressed. No man who seeks to render another a service fears the light of day. It is only the rogue who seeks the cover of darkness for his operations. Whenever any person seeks to lure you up a dark alleyway on the pretense that he wants to serve you, be sure that he means to cheat you. Do not parley with him for a moment. Call a policeman on the spot if you want to preserve your property and your character.

The final argument in favor of publicity as a remedy for corporate misconduct of every character is its simplicity. It is not a suggestion of new laws, but of more efficient machinery to enforce existing laws. Before leaving this branch of the subject I will venture to outline a system for securing such publicity of corporate administration as would effectively prevent favoritism to individuals, oppression of the public, and fraud on the corporations themselves.

Every person using a public facility should have the right to know the terms on which the same service is enjoyed by every other person. Every stockholder should have the right to examine the books of a corporation and to learn every detail of its operation. If it be objected that to allow the holder of a single share in a corporation capitalized for millions, to examine its books at pleasure, would disturb its business, the answer is simple. If a corporation doesn't want a great number of stockholders it need not have them. It has but to divide its capital stock into shares of five hundred or a thousand or ten thousand dollars each in order to reduce the number of its shareholders. Corporations divide their stock into a great number of shares because it is easier to raise money from many persons contributing each a small sum, than from a few persons each contributing a large amount. If the corporation enjoys the advantage of such a subdivision of its capital, it should accept a corresponding responsibility to every individual shareholder. Indeed, under existing laws, every stockholder has a right to examine the books of a corporation, if the courts would enforce it. In this respect the only new

legislation necessary is an act compelling the courts to grant as a matter of right, what today they grant as a matter of discretion.

Every corporation should be compelled to file with the secretary of state at its organization a statement of all the property, franchises, goodwill, and assets of every description on which its capitalization is based.

It should be compelled to make a full report every year of all its business to some department of the state. This is the law today in nearly every state, but. I believe that it is evaded in all of them. The reports are invariably misleading, when they are not incomprehensible. It would not be difficult to make provision for such clear, specific statements as would enable everybody to understand the exact financial condition of every company doing business under a corporate charter. The public could then estimate the value of its shares, and no man need be defrauded, no matter what its nominal capitalization might be.

The powers now exercised in almost every state by the department of insurance and the department of banking should be extended so as to make it the duty of some public authority to examine the condition of every corporation, to scrutinize its operation, and to institute criminal proceedings against any officers attempting to practice fraud or concealment in preparing the reports exacted by law. The failure to place the law in motion against them would then be accepted by the public as proving the honesty of their management.

Finally the violation, evasion or disregard of any of these provisions should be punished by long terms of imprisonment. Where great sums are to be gained by disobeying the law, fines will not secure obedience to it. Under such circumstances, fines are too often regarded as mere taxes on financial operations, to be collected subsequently from the public.

With these simple remedies prescribed and rigidly enforced, no form of corporate corruption or oppression could be practiced, and I promise you that when honesty governs corporate officers the distrust and dislike of corporations now so general will disappear from the minds of a liberty-loving

people, who are always seeking justice even through their prejudices.

Chicago Conference on Trusts. 1900. pp. 409-22.

A. E. Rogers.

Trusts and fraudulent corporations are the results of vices and imperfections in our corporation laws. When these are remedied, and not until then, will the evils of which they are the cause disappear. In the domain of law, which is that of ideas, and principles and reason, ultimate truths are the only safe foundation on which to build. Legal fictions often have highly important functions in unifying legal rules; they serve, so to speak, as a scaffolding, useful in raising the structure of our jurisprudence, but constituting no real part of it. In determining and shaping important economic conditions, however, fictions, legal or otherwise, have no place; we must be guided by the absolute facts of human life and human experience.

As civilization advances, and as science, and wealth, and trade increase, the public and private relations of the different members of society become more complex and the problems that our legislative bodies are called upon to solve necessarily demand on their part increasing skill and intelligence. To understand even a branch of our legal system has become the business of a learned and laborious profession. But the great principles, along whose lines the development of our substantive law should proceed, must be the business of all enlightened and thoughtful men, if we are to realize in our jurisprudence that justice so well described by the Roman jurist as "the set and constant purpose that gives to every man his due."

Assuming that the views set forth in this paper embody correct principles, the next question is: How can we make these principles dynamic, render them effective in shaping actual legislation?

The first step in this direction is, I believe, an organized effort to secure uniformity of the corporation laws of the different states.

At present the great difficulty in the way of the application of correct and rational principles to the development of our corporation law, especially in the all-important matter of organization, lies in the fact that certain states are ready to prostitute their sovereign power for sake of revenue, and to enter into competition to secure patronage in this shameless traffic, regardless of their own honor and of what is rightfully and justly due to other commonwealths.

From such a traffic and such a competition not only does there result a continuous leveling down on the part of the states engaged in it, but almost insurmountable obstacles are placed thereby in the way of those states seeking to maintain or establish proper and rightful standards. A general and strongly sustained effort to secure uniformity would, above anything else, counteract these demoralizing influences, and tend to substitute public welfare in the place of short-sighted selfishness as a determining factor in our legislation.

Undoubtedly a few states might be disposed to resist efforts looking toward reform, but concert of action on the part of the others in regard to corporations organized under the laws of these recalcitrant commonwealths would reduce their power for evil to a minimum.

Approximate uniformity of the corporation laws of the different states being secured, national legislation, also, could be more intelligently framed for the purpose of complementing state legislation, and made much more effective in meeting those evils which because of the exclusive control of Congress over interstate commerce the state legislatures cannot reach. Federal legislation, however, as affecting the evils resulting from the abuse of corporate power and privileges can be nothing more than complementary, the reform must be essentially worked out by state action.

The American Bar Association has already done most excellent work in securing uniformity of state legislation along certain lines, notably that of commercial paper, and commissions on uniformity of state laws have been provided for in a majority of the states. It seems certain that if this conference with its great influence should make an earnest and

organized effort in conjunction with these bodies to secure uniformity of corporation laws throughout the Union, a high degree of success would be assured from the outset.

Arena. 24: 569-72. December, 1900.

Remedies for Trust Abuses. Frank Parsons.

Trusts and combines have more than doubled in the last three years (1897 to 1900). They are working havoc with our business interests: killing the small concerns, building monopolies that enable a few men to control the output and the prices of staple products and necessaries of life, centering the arbitrary sway of national industries in little groups of industrial aristocrats—coal barons, sugar dukes, railroad princes, steel kings, oil emperors, etc.,—and levying taxes on us without representation (and for private purposes) by the side of which the taxes of King George were but a zephyr as compared to a cyclone.

It is not needful here to enlarge upon the excessive charges and exorbitant profits that are sucking the wealth of our farms and homes into the coffers of the trusts, compelling the farmers and wage-earners to buy in a monopolized market while selling their products and labor in a competitive market, buying high and selling low, and paying in the difference a vast tribute to monopoly. Neither is it necessary now to dwell upon the lawlessness and corruption of government that characterize the trust regime. Trust abuses are pretty well known. But the vital matter of a remedy is still in the dark; and on this point we wish to present in outline a new plan, which goes to the root of the matter and eliminates the evils of the trust while retaining and intensifying its benefits—after which we will summarize the auxiliary means of control and regulation that may be applied to trusts and combines.

The core of the trust is private profit, and its foundation is railway discrimination or other special privilege. Organization for service is good, but organization for plunder is bad. If private profit can be tied to cooperative and public-spirited

organization, and private loss attached to aggressive and unjust organizations, capital will rush into cooperative and public-spirited forms of union as eagerly as it now rushes into anti-public forms. This change in the basis of profit can be brought about through the power of taxation.

Take the present rate of taxation in ordinary competitive business as the median level. Make the taxes on cooperative industries progressively lower in proportion to the size of the union and the extent to which it opens its doors to the interests of the public and the employees. Put the taxes on aggressive trusts and combines, etc., above the median level in geometric ratio according to the size of the combine and the intensity of its exclusion of the public from all part in fixing prices and wages; low taxes to an organization that would open its books to public inspection, adopt profit-sharing with its employees, keep water out of its stock, and agree to the fixing of prices and wages by a board of arbitrators—one selected by the labor involved in the industry, one by capital and one by the public; still lower taxes to an organization that would put the cooperative principle into full play, making the public and employees partners in the management and sharing with workers and consumers, in just proportion, the whole profits beyond a reasonable interest on the actual capital and a moderate sinking fund against loss and depreciation. On the other hand, a trust like the Beef Combine, which seeks the ruin of all competitors, should be taxed out of existence. A lawless concern like the Standard Oil, which conspires to blow up rival refineries, pulls up competing lines, conquers the market with railroad rebates, bribes public officers, perjures itself, steals public documents, and mutilates court records—such a concern should be taxed to the whole extent of its income, for it is all the tainted product of fraud and violation of law; and if it still persisted in doing business on the antagonistic plan, endeavoring to conceal its income, etc., its plants and property should be confiscated to public use for defiance of law.

Use the taxing power, repeal the protective tariff on trust goods, abolish railway discrimination, and put the govern-

ment in the hands of brave and honest men that will enforce the law, and the monopoly evil will vanish, as it did in Queen Elizabeth's day before the power of honest courts and a just parliament.

There are many other ways by which the evil power of monopoly may be checked and controlled, though none that go to the root of the matter as thoroughly as the measures already mentioned. We can clip the wings of the trusts by insisting on publicity, requiring fair capitalization and arbitration in the fixing of prices and wage. We can limit the profits a trust may make. The federal power over interstate commerce is sufficient to deny transportation to the goods of unlawful combinations. We can also deny the use of the mails to such combines, as we did to the Louisiana lottery. We can forbid the raising or lowering of prices by a combine in one locality without corresponding change in its rates in other localities. We can take away the franchises and special privileges on which monopoly rests. As William Jennings Bryan well says, we may require every trust or large organization to secure a federal license before it can do business outside the state in which it was organized, and we can provide that the federal authorities shall grant no license except "upon conditions that will in the first place prevent the watering of stock, in the second place prevent monopoly in any branch of business and, third, provide for publicity as to all of the transactions and business of the corporation, (trust or other organization). And then provide that if the law is violated the license can be revoked." Through state legislation we can require a similar license to do business in the state of organization. We can use the strong arm of the Attorney-General's office to crush combinations that aim at control of the market or seek to establish or perpetuate a private monopoly. We can use the whole machinery of the government against the trusts and monopolies.

By means above suggested we can make the disadvantages of organizing capital on the aristocratic, anti-public, ring-for-private-profit plan so emphatic, and the advantages of aggregating capital for cooperative or public-spirited industry so

pronounced that capital will organize along cooperative lines and offer employees and consumers a reasonable share in the benefits of the combine. A trust is a good thing for those inside of it, but bad for the people on the outside. The union of capital is most excellent if it is for service and not for conquest. But private monopoly is wrong. No man or combine should be allowed to control prices. The market must either be open or controlled in the public interest; where monopoly is necessary it must be owned or controlled by and for the people. The people of this country have it in their own hands to say whether united capital shall be their servant or their master.

Outlook. 82: 96. January 13, 1906.

State Control of Corporations. W. F. Potter.

For the most part I agree so thoroughly with the views of the Outlook that it only emphasizes an occasional point of difference. In the last issue you repeat a statement which in my judgment, ought not to pass without protest. You say, referring to federal control of corporations, "proper control is no longer possible by the single state which creates corporate existence." I beg leave to question sharply the accuracy of this statement, and I submit that it has no foundation in fact. On the contrary, the state which creates corporate existence has the power of complete control over its creature, as absolutely as has the potter power over the clay which grows into shape under his hands and which takes the form that he gives to it.

A corporation can do nothing except that which by its charter it is authorized to do. It is in this respect limited—like the powers of the federal government. It can do that only which its charter expressly or by fair implication gives it the right to do.

Plainly, then, the remedy for wrongful action by corporations lies in limiting their powers, when they are being created, and by supervising them more closely, by the same authority which called them into being.

Does any one doubt for a moment the power of the state of New York to supervise and control to any desired degree the insurance companies chartered by that state? Certainly not. Insurance companies can be controlled by the state to just the same degree and with the same success as are the savings banks. The only trouble heretofore is that the state has not attempted to discharge this duty. But her ability to do it cannot be questioned.

Neither can the right of each state to protect its people against the inroads of loose or unsafe corporations organized in other states be questioned. Under the principle of comity between the states, a very broad and liberal practice has grown up of permitting practically free and unrestrained access to the people of the various states by corporations of other states. But this principle has been carried too far and has been abused. Here again the power to protect themselves is ample, and needs but to be called into play. The American people are entirely capable of protecting themselves in all of the several states and in each community.

The real danger in any attempt at control of corporations by the federal government is that it would be made the excuse for preventing the people of the states from guarding their own interests. Under the plea of a federal license, the dangerous and predatory concerns would claim the right to invade the whole country, without regard to the protests or sound requirements of the states that might desire to protect their people. We are not infants. We do not require the protection of any bureau at Washington. In fact, supervision by the national government would be a farce. No matter how good the intent might be, it would be impossible to supervise the business interests of this great, vigorous country of ours by any bureau of clerks at the national capital. Such an attempt would be unwise and un-American. We believe in home rule, and the right and duty of self-government in this country; and it would be a sorry day indeed when the people of any state in the union acknowledge their inability to protect themselves from the evils and dangerous practices of a corporation created under the laws of their own state, or that of any other state of the union.

Just give the people a chance. Do not fetter them or tie their hands by any attempt to take from them the power of control, by centralizing it at Washington, and there will be no difficulty in properly protecting every right and in preventing its invasion. No greater calamity could befall us as a nation than the formation of the habit of looking to Washington for help, instead of helping ourselves at home. The curse of Russia is its system of bureaucracy and centralization. Let us not turn our faces towards a system which Russia is struggling to throw off. Urge, rather, the assumption of thorough and reasonable control by each state over the corporations which it creates, and the exercise of the right by each state to exclude from its borders such corporations created by other states, as do not comply with its own reasonable requirements enacted for the protection of its own citizens. In other words, let each state require from the stranger within its gates the observance of the same rules and regulations which it imposes upon its own people for their own good. Were this done, there could be no reasonable complaint.

North American. 188: 321-35. September, 1908.

Constitution and the New Federalism. Henry W. Rogers.

We are threatened with a revival of Federalism—a Federalism that is more extreme and radical than the leaders of the old Federal party ever countenanced. The argument proceeds on the assumption that the states have failed to perform their duty properly, so that great evils have grown up which the states cannot or will not remedy, and from which we should have been free if only the federal government had possessed the authority and not the states.

That the evils exist is conceded. That the states have not done their full duty also is conceded. But that the federal government would have done better is a mere assumption and one I am not prepared to accept. Congress now has in the territories and District of Columbia all the powers which the state governments possess; yet the legislation respecting the corporations which Congress has enacted has not been better than

the legislation of the states on the same subject. The laws of Congress have not secured publicity of accounts, nor prevented over-capitalization and stock-watering, and an adequate system of inspection has not been established over federal corporations. The Union Pacific Railroad, with which Congress has been concerned, had, upon its reorganization in 1897, a share capital of $136,000,000, which at market prices was worth only $54,000,000, showing an estimated over-capitalization of $81,330,000. Congress has provided for the examination of the national banks. But the inspection of the national banks is not superior to the system which Massachusetts has established for the inspection of its state banks. The law of Massachusetts regulating insurance companies is as good as, and in some respects better than, that which the advocates of a federal law endeavored to get Congress to enact a year or two ago. And about the time the President was declaring in messages to Congress that the states were incompetent to deal with the problem of insurance, the state of New York, under the guidance of its present governor, enacted an admirable piece of legislation, superior to that which the president of a New Jersey insurance company, himself a senator, was seeking to impose upon Congress, under the fallacious assumption that insurance was interstate commerce, the Supreme Court of the United States to the contrary notwithstanding. During the present year, the same state, under the direction of the same governor, has enacted a Public Utilities Law, which, as a piece of constructive legislation intended to curb the public service corporations, is in advance of anything which has come from Congress respecting the corporations it has created, or over which it has control as the legislature for the territories and the District of Columbia.

That in times past state legislatures have been under the control of special interests is too true. But, unfortunately, so has Congress. One evidence of it is seen in the tariffs established from time to time. Under the pretence of protecting labor, tariffs have been fixed, not merely high enough to cover the difference in the cost of labor here and abroad, but far in excess thereof, and so high that the great mass

of the people of this country have been exploited so that the privileged few might build up enormous fortunes. The legislation has not been in the interest of the working man nor for the benefit of the people as a whole, but quite the reverse. Those who have been benefited by such legislation have been certain privileged classes, the coal barons and the beef barons, the steel barons and the lumber barons, the sugar barons and tobacco barons of the country, who have been permitted by Congress to write the tariff laws of the United States.

Scandals there have been at times under the state governments, and scandals likewise there have been under the federal government. Unfortunately, scandals are likely to arise under any government; for the men who are entrusted with public office are not always of high character or distinguished for probity. But the national government has had its full share in the shame and disgrace occasioned by those who have betrayed their public trusts. Some years ago, Senator Hoar of Massachusetts, speaking in the Senate of the United States of a work authorized by Congress, said:

"When the greatest railroad of the world, binding together the continent and uniting the two great seas that wash our shores, was finished, I have seen our national triumph and exultation turned to bitterness and shame by the unanimous reports of three committees of Congress—two of the House and one here—that every step of that mighty enterprise had been taken in fraud."

The fraud and corruption which have attended upon our dealings with the Indians extend through a century of dishonor. The memory of the Credit Mobilier, of the Whiskey Ring and of the Star Route Ring has not faded out of mind. The revelation made a short time ago as to the corruption which existed in the Post-Office Department and in the Agricultural Department are fresh in the public recollection, as are the frauds connected with the administration of the public lands. But recently, the President suspended the Public Printer on charges of mal-administration.

The tendency to take their domestic affairs from the control of the state is shown by the agitation in favor of a national

incorporation law. It is assumed that the power to regulate commerce includes the right to regulate the corporation which is engaged in commerce. But if, under its power to regulate commerce, Congress can assume control over all corporations which engage in interstate commerce, it is difficult to see why it has not an equal right to assume a like control over all partnerships that do any interstate business, as well as over all individuals whose business is of a similar nature. In this way, Congress can take to itself jurisdiction over a very large part of the business of the country, withdrawing from the control of the states what always has been supposed to be within their peculiar province, and working a fundamental change in the character of the government itself. It may be very seriously questioned whether the mere fact that a corporation or a partnership is engaged in interstate commerce affords any sound legal reason for assuming that Congress has the right to exercise an exclusive jurisdiction over every such corporation and partnership or individual who engages in interstate commerce, even though the interstate commerce may be but a part of the business of such corporation or partnership, as they may be likewise engaged in intrastate commerce. So that if the regulation of corporations is a regulation of interstate commerce it may be a regulation of intrastate commerce as well.

If Congress has jurisdiction over every corporation which to any extent engages in interstate commerce, what is there to prevent Congress from declaring that the vast properties which these corporations control shall not be taxed by the state governments without the consent of Congress? The states cannot tax national banks except to the extent authorized by the national banking law. If all corporations engaged in interstate commerce are to be compelled to incorporate under a national incorporation law, why may not Congress prohibit the states from taxing such corporations or the properties which they own? It is nothing to the purpose to say that Congress would never exercise the power. The fact that it could exercise the power, and might sometime do so to a greater or less extent, is one not lightly to be lost sight of,

as these corporations own a very large proportion of the wealth of the country, the withdrawal of which, from the taxing power of the states would be most mischievous, crippling the resources of the states and imposing new burdens of taxation on the individual citizen.

Political Science Quarterly. 18: 1-16. March, 1903.

Federal Control of Trusts. Alton D. Adams.

Can industrial trusts, by means of corporate charters granted by Congress, escape such powers as still remain in the several states to tax, regulate and exclude? The desire of trusts to escape through federal incorporation the exercise of these powers is squarely presented by Mr. James B. Dill in the Yale Law Journal for April 1902. The writer there says:

> National corporations should be assured by the privileges and immunities guaranteed to natural persons by the Constitution of the United States, and discrimination against them by state laws forbidden. . . . Its stock (referring to a national corporation) in the hands of stockholders might be exempted from taxation of every nature.

Congress in the exercise of its powers may charter corporations to carry these powers into effect. In this way banking, railway, telegraph, bridge and canal companies have received federal charters. Such corporations are exempt from state taxation and regulation, in so far as these would impede the execution of the powers of Congress. Another class of corporations, organized merely for private business, and destitute of any agency to execute the powers of Congress, have also received federal charters. Included in this class are insurance companies, and a savings and trust company.

When considering the powers of states over this second class of federal corporations, the nature of a corporate charter should be held clearly in mind. Such a charter is merely a legal license to one or more persons to act in a certain way. In Paul v. Virginia the Supreme Court said:

> Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability.

These special privileges can be exercised only where the law granting them can be enforced. The constitution provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." In the case just named it was contended that a law of Virginia, discriminating against insurance companies chartered by other states, was in conflict with this clause of the Federal Constitution. Replying to this contention, the Supreme Court said:

> The privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It is not intended by the provision to give the laws of one state any operation in other states. They can have no such operation, except by permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given.

The Virginia law was therefore held to be constitutional.

Can trusts chartered by Congress to carry on the manufacture and sale of commodities escape the operation of state laws to any greater extent than corporations chartered by any state? Either a state corporation or a federal corporation is free to engage in interstate commerce in any state, because control of this commerce is in Congress. But, as said by the Court in the Knight case, "Commerce succeeds to manufacture and is not a part of it." Manufacturing and trading corporations chartered by any state are subject to the control of any states to which they go, as to manufacturing and all other operations save interstate commerce. If industrial trusts chartered by Congress are to escape regulation by the states, it can only be on the ground that such regulation would impede the execution of federal powers. But manufacturing and trading corporations execute no federal powers, because their operations do not involve the exercise of any such powers. Manufacturing and trading in commodities are not the exercise of either state or federal power, though states may control one set of these operations and Congress the other. If it is exercising federal power to engage in interstate commerce, then millions of private persons exercise this power daily. State

corporations as well as private persons are now engaged in interstate commerce; will it be contended that Congress may remove these corporations and persons from the control of state laws in all matters because the regulation of interstate commerce is a federal power? How then is a trust with a charter from Congress to escape the operation of state laws? A federal charter or license or special privilege is not alone sufficient to protect a corporation from the laws of the states where it operates. To render such laws invalid, they must conflict with the powers of Congress. Speaking of state laws that obstruct the exercise of powers vested in the general government, the Supreme Court, in Railroad Company v. Peniston, said: "The implied inhibition, if any exists, is against such obstruction, and that must be the same whether the corporation whose property is taxed was created by Congress or by a state legislature.

It has been uniformly held by the Supreme Court that a license or special privilege granted by Congress is no protection from state laws in matters reserved to the states. In the License Tax Cases it was contended that license from Congress to sell lottery tickets or to retail liquors gave authority to do so in states where the local laws prohibited these operations. The court pointed out that Congress, having power to regulate interstate commerce, might grant coasting and other licenses, and then continued:

> All such licenses confer authority and give rights to the license. But very different considerations apply to the internal commerce or domestic trade of the states. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the states. . . . Congress cannot authorize a trade or business within a state in order to tax it.

As Congress lacks the power to authorize the sale within a state of liquors at retail or of lottery tickets, it is hard to see how a federal charter will free the manufacturing operations of a trust from the burdens of a state law.

A patent right is a special privilege granted by Congress to inventors in the exclusive sale of their discoveries. Such a license cannot be acted on in a state where the sale of the

patented article is prohibited by local law as unfit or unsafe for use. This was the decision of the United States Supreme Court in Patterson v. Kentucky, where a state law prohibiting the sale of a patented illumination oil was upheld.

Another instance of the inability of Congress to confer special privileges in matters subject to state laws exists in the Trade-Mark cases. Congress provided for the registration of trade-marks in the Patent Office, and granted a right of action for the wrongful use of registered trade-marks, by an act of July 8, 1870. The wording of the act was so broad that it included all wrongful use of registered trade-marks, whether in foreign or interstate commerce or in commerce confined to a single state. In the Trade-Mark Cases this act was contested on the ground that Congress has no power to regulate trade confined to a single state. After pointing out the authority of Congress over interstate and foreign commerce, the Supreme Court said: "There still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same state, is beyond the control of Congress." Because the act assumed to regulate trade within any one state, it was unconstitutional and void. This decision clearly shows that a charter, license or special privilege granted by Congress for the particular benefit of an individual or corporation, and not to execute any express federal power, cannot prevent the operation of state laws.

The power to grant corporate charters is nowhere delegated to Congress in express terms by the constitution. When such charters are used as a means to execute the authority clearly delegated to the general government, they are beyond state regulation. When a bank issues notes to circulate as money, as when a railway transports freight or passengers, from state to state, federal powers are clearly executed, because the value of money is regulated in the one case, and interstate commerce in the other. But when a natural person or a corporation uses a piece of unlawful money to make a payment, or delivers a box of freight for transportation from one

state to another, such a person or corporation does not exercise a federal power. These acts are subject to federal power but are not of its essence.

Apart from the execution of federal power, a corporate charter granted by Congress can claim no more exemption from the law of a state where it is employed than can a similar charter from another state. Will it be claimed that the insurance company chartered by Congress, as noted above, can escape the regulation of states where it may do business, in spite of the decision in Paul v. Virginia? Such a conclusion can hardly be reached; for the Supreme Court in that case based its decision, previously stated, on the ground that a foreign corporation can claim no rights not granted to it in a state to which it goes. A corporation chartered by Congress would be a foreign corporation in every state, though not in the District of Columbia. If a federal charter is all that is necessary in order to escape state regulation, the great insurance companies would have obtained such charters long ago and avoided control by individual states.

If a license from Congress to retail liquors or sell lottery tickets gives no authority to do these things against the law of any state, a trust cannot, by means of a federal charter, escape regulation and special taxation in states where it does business. If a patent right granted by Congress cannot be exercised in defiance of state law, neither can a foreign, federal corporation avoid such conditions as may be imposed on its operations within any one state. If Congress cannot control the domestic business of a state by means of trade-marks, whence comes its power to do so by corporate charters? If an insurance company chartered by Congress may be specially taxed in or excluded from any state, how is a federal trust to escape state taxation and regulation as to local operations? Until answers are found for these questions, federal charters will not relieve trusts from the operation of state laws.

It may be suggested that an amendment to the Constitution would take away such powers as the states now have over trusts. To the consolation of this suggestion the trusts are

fully entitled. In the meantime the states will be in no hurry to surrender the remnant of their powers to a Congress that has neglected to protect the public from the exactions of monopoly price.

National Conference on Trusts and Combinations, Proceedings. 1907. pp. 231-45.

Corporate Reforms. Eugene E. Prussing.

In every state of the Union changes are being made in corporation laws. Conventions of attorneys-general and other state officers are being held to consider ways of curbing and curing corporate abuses. We are here today for a similar purpose.

The American Bar Association has for many years been at work to bring about uniformity of the laws of the states on various subjects. It has prepared codes on bills and notes, divorce and similar matters and submitted them to the various legislatures through local committees or state bar associations and in a number of instances its codes have been enacted into laws. The plan is sensible, logical and slow enough to meet with the approval of conservative minds. An attempt at federal control of all or most corporations would be so great a step in the direction of centralization of all government and so serious an inroad upon local and state rights as well as so cumbersome and dangerous in its delays as to arouse universal opposition, while individual state legislation, properly guided, standardized and harmonized, can be obtained by a campaign of education and friendly cooperation. The same laws will not fit all the states. There are differences so strong and peculiar that the laws on a subject like this must vary in different states. But the basic difficulty is universal, as is also the remedy. The time is ripe throughout this entire valley; the struggle is on.

Annals of the American Academy. 32: 225-34. July, 1908.

Railway Regulation in Texas. James L. Slayden.

The adjustment of the relative rights of the individual citizen and of his own powerful creature, the corporation, is the latest and one of the most perplexing problems with which we have to deal. The treatment of the question is complicated by the necessity of keeping in mind the constitutional limitations of the federal government and the jealously guarded reserved powers of the states. Furthermore, there is no denying the fact that we approach the consideration of this latter phase of the question more or less influenced by the political school in which we have been trained, and for this reason there is much fog.

I believe, I cannot help believing, that in the governmental supervision of industry and corporations it is better to leave all the control possible with the states. The states are nearer the problem and the people. The scope of that power and the limits of its exercise are gradually being defined by the courts, both state and federal, and it gratifies me as an American citizen to be able to say that when the boundaries are once clearly defined by the higher courts there is prompt, cheerful and general acceptance of the decision.

Independent. 58: 303-6. February 9, 1905.

How Congress Can Deal with the Trusts. Edward B. Whitney.

The Sherman Anti-Trust Law was enacted nearly fifteen years ago. The act not only made it the duty of the department of justice to enjoin its violators, but held out great inducement to private citizens who should suffer injury from the trusts. They were permitted to recover treble damages. Nevertheless private actions, like government injunction suits, have been comparatively few. If the trusts really do a great injury, either their methods have been so secret, as to be almost impossible of discovery, or the statute was ill conceived, or their

main operations are of such a nature as to be out of the reach of Congress under the federal Constitution.

The constitutional difficulty is a very serious one. When we speak of trusts we usually mean the so-called "industrials"; we mean combinations of persons engaged in an industry of production—such as mining, manufacturing or agriculture—as distinguished from the work of transportation. But Congress has no direct power under the Constitution to regulate production. It has no direct power even to regulate commerce that is confined within the limits of a single state. It can regulate commerce only within the territories or the District of Columbia, with foreign nations, among the several states, and with the Indian tribes. Nor can it interfere with producers on the ground that they are indirectly affecting interstate commerce through the magnitude of their operations. This was decided in the case of the Sugar Trust, but was nothing new. The principle had been familiar from the earliest days of our government.

The principle is simple, but its application is very difficult. The Supreme Court is grappling with it at this very moment in the case of the Beef Trust, which has used the highest business and legal skill to arrange its operations so that they should be out of the reach of Congress. In almost every case where the statute is invoked against an industrial, there is here ample room for litigation.

Then the law itself was hard to construe, because the terms that it used were very general, leaving it to the courts to work out its application. The judges of the lower federal courts at first were commonly quite hostile to the statute and their rulings left little of it. The brilliant victory of Attorney-General Harmon, however, in the Trans-Missouri case, and the successful prosecution of the Addyston Pipe case, commenced by him, proved that the statute, if the necessary evidence were forthcoming, could be made effective as against any combination which bore directly upon that commerce which it is within the power of Congress to regulate. Congress, however, made no adequate appropriation for its enforcement until February,

1903. Without sufficient money or power until then to conduct efficient investigations, the successive Attorneys-General had to rely on such information as they could pick up from the newspapers or from some accident. The time is as yet too short since February, 1903, and the suits prosecuted since then are as yet too few, to enable us to judge accurately what practical effects are to be expected from an enforcement of this law with all the power of the federal government.

But the constitutional difficulty will always be present. This may be best illustrated by the actual result of the only case which the government has successfully carried through the courts under this statute against an industrial combination. The judgment which it obtained enjoined the Addyston Pipe and Steel Company and five other corporations from combining to restrain interstate commerce in cast iron pipe. The case was finally decided by the Supreme Court in 1899, and by that time the six corporations, together with six others, had all sold out to a new corporation organized and flourishing under the laws of New Jersey, with a capitalization of $25,000,000, and controlling the larger part of the cast iron production of the United States. Because it sufficiently controlled production the new corporation did not have to put direct restraint upon commerce. The statute could no longer reach it. The government's injunction stood as a precedent and a warning and a vindication of the majesty of the law, but the parties enjoined had disappeared from the scene. In the same way most of the old industrial combinations against which this statute was aimed have also disappeared from the scene and been succeeded by gigantic corporations, each of which is indeed a combination, but a combination outside of the present statute, and which claims to be outside of the sphere of federal control.

This change of scene has brought about an agitation in favor of a national incorporation law. The agitators propose to require all of the trusts to take out federal charters, and thus subject themselves to the regulation of the federal government. But right here comes in with fatal force the con-

stitutional objection. It will not do to answer that the Constitution can be amended. It has not been amended since 1804 by any methods than can ever be used again. There is no greater prospect of passing an amendment now than at any other time during the intervening century. There will be further amendments in the future, and probably another constitutional convention to prepare and submit them, but that future is too far distant to wait for.

A less fanciful proposition is that of a national incorporation law for the purpose of incorporating industrials under national protection and regulation to compete with those with which we are at present acquainted. The idea is that corporations regulated from Washington would be so much better than corporations regulated from Trenton as to put the latter out of business. If this be so, and if it is safe and wise for us to put this new impetus upon the progress of centralization at Washington, still the Constitution must be reckoned with. It is proposed to get around that inconvenient document in one of two ways—either to grant charters ostensibly under the power to regulate commerce in the territories or the District of Columbia, really expecting the companies to migrate and go into business elsewhere, or else to charter interstate jobbing companies with incidental power to produce the articles in which they are going to deal. It is not possible to discuss these ingenious contrivances within the limits of the present paper, but they would probably have to pay a high premium for a policy of insurance against the Supreme Court.

If we cannot destroy the trusts by means of a national incorporation law, it remains to consider what we can do under the present federal powers by way of regulating and controlling them. Probably every one of them desires to engage in interstate commerce by selling and shipping goods across state lines. That is their vulnerable point. They are all corporations. Like the Cast Iron Pipe Trust, they have become corporations partly in order to escape from the laws that already existed. A corporation, however, is only a body of men working together under a certain kind of license. This license

has been derived from some legislative body. In nearly every case that we are now concerned with there has been reserved a right to revoke it. To engage in business in any state a corporation must have a license from that state as well as from the state that gave it birth. To engage in interstate commerce there is good reason to believe that the permission of Congress will be held also requisite. Hitherto this permission has been tacit and unconditional. It may, however, in the future be made conditional, and the conditions may be severe. This is the method proposed by Commissioner Garfield. The corporation may be restricted by conditions until the point be reached when it prefers to abandon interstate dealings altogether, each of its factories selling its full output at its own door.

The conditions now proposed are mild, altho the Commissioner's suggestion as to imposing "all necessary requirements as to corporate organization and management as a condition precedent to the grant of such franchise or license" may be meant to go a long way. It is proposed that each corporation shall share its secrets with the Administration in power for the time being at Washington. Some people think that it would be better to have the secrets shared with all the world—to make reports and investigations public. The sacredness of corporation secrecy is a tradition dating from the time when corporations were small affairs, competing with individuals or partnerships, and not regarded as a menace to the public. The public may come to the conclusion that when a corporation exceeds a certain size the sacredness had better no longer be respected. The secrecy is too often used for the benefit of the managers. The corporation too often suffers together with the stockholders and the public. If a corporation large enough to be a political issue in itself cannot compete with rival corporations, or with partnerships or individuals, under conditions of publicity, the public may yet decide that it might as well go to the wall. Whether this happens or not, confidential relations between the trusts and a Washington bureaucracy are not likely to last forever.

Conditions more radical may be imposed if it comes to a last resort. A corporation was called by Chief Justice Marshall a "company of individuals." The power which licenses it may impose restrictions upon its size and upon its power. The membership of the company may be limited—that is, the capitalization may be restricted. The amount of its property may be limited. License taxes may be imposed with severity. The industrials cannot escape by organizing subsidiary companies and by holding the stock of those companies, because Congress may impose as a condition of entering inter-state commerce that the stock shall not be controlled by any other corporation. It may restrict the amount of stock that can be held by any single member. These things are not yet proposed, but it is well to bear in mind the reserve forces upon which Congress can draw.

There is a particular class of so-called industrials that are not industrials pure and simple, but combinations which transport as well as produce. The most familiar example is the United States Steel Corporation. That company, indeed, does almost nothing itself. It is a parasite. It holds and votes the stock of a large number of other corporations, and thereby controls and keeps together under a common policy a variety of mines, factories, railroads and steamship lines. This combination in its present state could be broken up by a statute providing that no corporation shall hold more than a given amount, or more than a given proportion of the stock of any corporation engaged in interstate transportation, or that no corporation engaged in interstate transportation shall be also engaged in any productive industry, or shall be interested in property so engaged, or shall hold stocks or bonds of producing companies. Such a statute would apply also to combinations like those which form the so-called Anthracite Coal Trust.

It is commonly forgotten how very new a thing a so-called "holding company" like those last mentioned really is. Until about the time of the Anti-Trust Laws there were only a few under special charters. Most of them now emanate from the

states of New Jersey and New York and have been legal in those states only within the past fifteen years or so. Until then the power of one industrial or transportation company to hold stock in another—a power which did not exist under our American common law—was very restricted. It is this new development of our legislation which has been the most efficient and rapid instrument of over-capitalization. Its effects are most deleterious, however, not among the industrial trusts, but among those which dominate the public service franchises, and especially those of our great cities. As each franchise becomes more valuable, and dividends become likely to go up, a new corporation is organized, which buys the stock of the old one, pays for it partly in bonds and partly in new stock, scatters both in large quantities among small investors, and meets popular demands for more reasonable rates, or better train service, or less crowded trolleys, or purer gas, or cheaper electricity with the warning that dividends would be destroyed and coupons jeopardized. Congress and the courts have this difficulty to face in dealing with modern railroad combinations and with some industrials; but it is at the state capitals rather than at Washington that the status of the holding corporation should be most carefully reconsidered.

Space has permitted the discussion here of those remedies only which operate directly upon the great industrials. Doubtless the first remedy actually applied by Congress will be an indirect one, through the regulation of railroad rates, rebates and favors. Later, perhaps, will come other indirect attacks, as by changes in our system of taxation; but of these there is no likelihood in the near future.

SUPPLEMENTARY MATERIAL FOR SECOND EDITION

Journal of Political Economy. 20: 373-405. April, 1912.

Character and Powers of Governmental Regulation Machinery.

Charles C. Batchelder.

The complete breakdown of the attempt of the several states to regulate interstate trade is the chief cause of the existing industrial distress. Few, however, realize how serious this disturbance is. Business men, alarmed by the wave of attacks on capital which has swept over the country, are afraid to put their money into new enterprises, or even to expand those already existing, with the result that business in all branches is on a hand-to-mouth basis, which means small or no profits and an increasing host of unemployed workmen. It is stated that there are 124,000 idle men in Chicago alone. Bradstreet reports that there were more failures in 1911 than in any year since 1897, with the exception of 1908, the year which bore the consequences of the disastrous panic of 1907. The liabilities of these failures were $188,094,007, 75 per cent greater than in 1902. These figures deal only with actual insolvencies, and do not take into account the large number of cases where concerns were in financial difficulty, but managed to avoid actual bankruptcy. The sufferers were not rich men, driven to the wall by prosecution for violations of the law, since 91 per cent of them had a capital of $5,000 or less; nor were they victims of the trusts, for only 3 per cent of them were forced out by competition. This year promises to be even worse, for the January failures amount to 1,897 as against 1,663 for the same period last year. Such is the situation, not in a time of panic, but after several years of good crops, while money is abundant and stocks of goods are

small—all conditions which should produce general activity and prosperity.

A similar commercial prostration, in 1787, contributed largely to the abandonment of the former Confederation, and the adoption of the present Federal Constitution, which as John Adams said, "was extorted by grinding necessity from a reluctant people." The main difficulty then, as it will be now, was the unwillingness of the states to surrender to the federal government their powers over commerce, which, from the very nature of the case, they could not exert with success, for commerce refuses to be cramped within state bounds.

The same remedy which was advantageous then should be applied now—the federal government should regulate interstate trade as it has regulated bankruptcy and the issue of banknotes. If it had exercised properly its powers in the past, we should not face today the problem of overgrown corporations.

Let us make a clear statement of the conditions which exist, and then consider in turn various expedients that may be suggested to better them. The present industrial situation will not be endured by the American people any longer. There is a general dissatisfaction with the result of the suits against the Standard Oil Company and the American Tobacco Company, though no blame can be placed either on the courts or on the Department of Justice, as they did their best with the inadequate legal machinery at their disposal. The people want lower prices and the cessation of oppressive tactics, and are not satisfied when they see many smaller trusts replace one large one. They realize that if the ownership remains the same in different companies, common sense will prevent a carnival of price cutting.

The substance of the popular demand, and not the mere name, must be secured by any rational solution of our present difficulties. The Sherman law, in the twenty-two years in which it has been in existence, has evidently failed to produce the expected results in restoring competition and in decreasing prices, and there is complaint from business men that its enforcement has caused commercial stagnation by interfering with the working of economic laws. Very many good citizens feel that even under the most liberal interpretation, the law forbids combinations which are essential to the welfare of society. Still more

are convinced not only that its strict enforcement means great hardship and injustice to thousands of honest and innocent investors, but also that if the full fierceness of competition is restored, the smaller and weaker concerns will be crushed out by their more unscrupulous competitors, leaving the field in the undisturbed possession of the more powerful organizations.

The real problem before us, therefore, is not to attempt the impossible task of preventing the combinations of capital, which are the very foundations of our civilization, but to remove the evils which have grown up under our policy of inadequate regulation. The question is one of methods not of principle: we need reorganization, not disorganization of our industries. We must have a campaign of education to bring to the attention of the American people definite plans of discussion and amendment, and our business men ought to stop their useless complaints and address their energies to formulating and advocating such a plan. Our voters have shown over and over again that they can be trusted to be fair, provided clear-cut issues are presented to them, free from confusing minor details.

Let us next review the various considerations which must guide us in constructing an adequate policy. It is an axiom that business can adapt itself to anything except uncertainty; so it is evidently essential to define by legislation in the clearest terms, so that every man may understand without legal assistance, what the policies of the government are, what practices are forbidden, what methods of combination may be employed, and under what conditions. It is lack of just this that is paralyzing business. It is stated without contradiction that corporations, unable to obtain satisfactory opinions from their legal adviser, have applied to the Department of Justice for guidance in vain, as it has no statutory authority to reorganize corporations in compliance with the laws. The disgust of business with the present haphazard method of government by lawsuit, the only available means provided by our deficient legislation, is shown by the recent loan to Germany of millions needed for the development of our own industries.

We must bear in mind in formulating our plans that radical changes in legislation are always unwise, and that the most satisfactory results are attained by the conservative use of meth-

ods which have stood the test of experience. Some of the ideas here advanced may seem extremely progressive, but they have all worked advantageously in some places, mostly in the conservative New England States.

There seems to be a general demand for equality of opportunity for all, for a decrease of the cost of articles to the consumer, for the fostering of small, independent concerns, and for the prevention of the domination of large industries by huge corporations. In order to attain these results, we may find it necessary here, as has been the case in other lands, to put under government control the privately owned natural monopolies such as lands containing coal, oil, ore, and various minerals, standing timber and the water needed for irrigation, power, and the supply of cities, because owners of these have it in their power to place an intolerable tax on the necessities of life.

One of the chief functions of government must always be to protect those who are unable to take care of themselves, and we are inclined to overlook the fact that the progress of our civilization constantly deprives us of the opportunity for free choice. The pure food laws were passed because it cannot be disputed that the consumer cannot possibly be expected to know which of the many preservatives devised by expert chemists are dangerous to health. The manufacturer of any size can no longer decide whether he will sell his goods at home or ship them by rail, so the government must guarantee him against overcharges in freight rates. When the laborers seek employment from corporations employing many thousands, it is ridiculous to assert that they are making a free contract as to wages, hours, and conditions of employment. The state, therefore, constantly steps in, for their protection, with laws regarding hours of labor, factory inspection, and employers' liability, and must inevitably take even more effective measures. The same line of reasoning justifies the defense of the consumer against large combinations of capital.

We shall have to go still farther, and protect the stockholders and bondholders in our corporations, just as the stockholders and the possessors of notes of our national banks are protected by the control exercised by the Comptroller of the Currency. We shall be obliged to abandon the fiction that a corporation

is a partnership on a large scale, in which all the partners have an intimate knowledge of the business, select the managers, direct the policies, and, consequently, should share in the varying profits and losses incident to every mercantile concern, and be responsible for its conduct. As a matter of fact, nothing can be farther from the truth. The owners of stocks and bonds regard them as an investment from which they draw a regular income of the amount of the customary annual dividend. If this is reduced, they feel injured, and often distrust the management and sell their stocks at a loss. There is no possibility whatever that they should take part in the management, shape the policies, or select the officers. It is a usual thing for a small minority of the stock, working in accord, to elect the officers of our largest corporations, year after year, by a judicious use of proxies. The state must therefore defend investors both from fraud from within, and from unfair treatment from without.

Immunity from harassing and conflicting state legislation can properly be requested by corporations which are asked to submit to the restrictions of federal control. Their plants should be fairly taxed by the local authorities, but they should be freed from state taxation, since they must bear their share of federal burdens. We have a wonderful opportunity to substitute a just and rational system of taxation for our present medley of oppressive laws, which are notoriously evaded, put a premium upon dishonesty, and thus substantiate the claim of the poorer classes that the wealthy are not bearing their share of the public expenses. It is perfectly possible to provide that all corporations shall deduct a federal income tax from all dividends paid to their stockholders, for England has for years found this system the only feasible one. Each state should receive from the federal treasury a share of this tax proportionate to the holdings of all persons residing in its territory as shown by the stocklists. This works well in Massachusetts, where the state divides its corporation tax with the towns. This tax would be a true income tax, and would not, like most of our actual taxes, be added to the price of goods, and thus be transferred to the shoulders of the public. As nearly 80 per cent of our total output is produced by corporations, the amount having increased from 60 per cent inside ten years, this measure

would produce a large revenue, as well as be just. The tax could vary with the necessities of the government, as is the English custom, and thus permit us to construct a budget like every other nation. The taxation of individuals and intrastate corporations would, of course, be left to states, which should be forbidden to tax incomes or securities of interstate corporations.

We must not forget that the laws of Nature are more powerful than those of man, and that if his statutes run counter to economic necessity, they will only bring commercial distress, and fail to accomplish their object. The most that legislation should do is to modify the operation of economic tendencies, giving them free play in one case, and checking their injurious consequences in another, employing usually the effective taxing power of the tariff or internal revenue duties. The state should interfere with business in general as little as is consistent with the protection against injury of consumers, laborers, creditors, stockholders, and the public at large.

Definite information as to what methods of combination are legal is more important to business than certainty regarding what is forbidden. If we are not to disorganize our social fabric, there must be some tribunal to which a trust may apply for guidance during the progress of readjustment to existing legislation. As there is now absolutely no provision to meet this real need, our business men feel that they are being persecuted when they are indicted for following well-established trade customs, to which tacit sanction has been given by inaction of our state and federal officials. The sympathy of the public with this feeling is shown by the refusal of our juries to brand as criminals esteemed citizens who have unwittingly committed technical violations of vague statutes. However lawyers may feel about the matter, it is difficult to find a business man who has the slightest assurance as to what is forbidden by the Sherman law even after its interpretation by the Supreme Court. Many firms feel that their trade associations are absolutely essential to preserve them from ruin, and are stupefied to find themselves persecuted for exercising what they still feel is an inalienable right to combine for mutual assistance.

An Interstate Trade Commission, with powers similar to the Interstate Commerce Commission, seems, therefore, absolutely

essential to the administration even of the existing laws, especially when high public officials, corporation lawyers, captains of industry, labor leaders, and "soldiers of the public good" all agree that it is the proper remedy. We may well, then, consider the composition of such a body, what its powers and functions should be, and what principles should govern its activities.

The Interstate Trade Commission should be so constituted as to command the confidence and respect of both the public and the business community, and, for this, the first requisite is that it be kept entirely out of politics. No man should be appointed who had held within six years a federal or state elective office, or one which is subject to confirmation by the United States Senate. The President should make appointments, subject to confirmation by the Senate, but each nomination should be accompanied by a certificate from the Civil Service Commission that the nominee was a man of standing, of not less than ten years' experience, and possessing the required qualifications.

It would be a good idea to have some of the members selected from a list suggested by certain well-known organizations, instead of being chosen at random. This plan has worked well in many places. It was the basis of the Trade Guild System, which so successfully governed the great commercial cities and states of the Middle Ages. To take a recent instance, the seven members of the Finance Commission, which did such admirable work for Boston, were appointed by the Mayor, under authority of the City Council, on nomination by the Boston Chamber of Commerce, The Associated Board of Trade, the Boston Merchants' Association, the Real Estate Exchange, the Clearing House Association, the Central Labor Union, and the Citizens' Association. Part of the success of Germany in all fields comes from a settled policy of employing experts, and we have made a great mistake in failing to follow this excellent example. The Interstate Commission should contain a lawyer suggested by the American Bar Association; a banker, by the Bankers' Association; a political economist by the Presidents of our principal universities; a labor leader, by the American Federation of Labor; a sociologist, by the Civic Federation; a business man by the National Chambers of Commerce; and five other men of affairs (not lawyers), possessing some knowl-

edge of economics and with an interest in the welfare of the masses. A board of eleven men would permit special problems to be investigated by committees in order to expedite procedure. A chairman and vice-chairman should be designated by the president from members who have served not less than three years.

The compensation and term of office should be such as to attract able men, who would evidently have to sacrifice their careers. The tenure of office should be five years, with two members retiring annually, both eligible for reappointment, if confirmed by the Senate. The president should have the right to remove a member when authorized to do so by a joint resolution of the Senate and House of Representatives, passed by a two-thirds vote of each. The salary should be $15,000 with a pension of $5,000, annually, if a member is not reappointed; but this pension should be suspended while the recipient fills any other salaried position, or engages in business.

The function of the commission should be to give all forms of industrial activity a free field to work out their own salvations, showing special favors to none, taking care that no injury is done either to the public or to each other, and sternly repressing all fraud, extortion, and coercion. In short it should assure fair play to the consumer, the capitalist, and the laborer. Plenty of money for investigation should be available, and the Bureau of Corporations should be transferred to the commission, which should also be affiliated very closely with the Census Bureau, in order to prevent expensive duplication. We have hardly begun to realize what a powerful weapon we have in the new "scientific management," which makes it possible to ascertain exactly what it should cost to produce an article, instead of accepting more or less inaccurate and interested statements. It is too early to carry this idea to extremes, but provision should be made to allow the commission to publish fair prices for staple articles produced on a large scale, so that the public might have reliable information upon which to base its opinion. This would also be useful in making tariff schedules. There is likely to be much opposition to this, but it is really for the best interests of our large combinations, as it will enable them to convince the public that it is not being overcharged, and will also be a check on inefficiency.

Publicity has been found in Germany and elsewhere not only to be the best safeguard for the investor, but also for the community. The provision of our laws that all food products shall be honestly labeled is an excellent example of the successful operation of this policy. The best available means to attain these ends is to give the commission full authority to prescribe the methods of accounting of every corporation engaged in interstate commerce, but there should be an appeal to the Commerce Court from any order that might be unduly burdensome or expensive. In case of concerns with a capital and surplus not exceeding $1,000,000, these prescriptions should not exceed the requirements of the Association of Certified Public Accountants for proper bookkeeping. The accounting should be supervised and audited, in accordance with the custom in England and in some of our states, by a certified public accountant approved by the commission, who, like bank examiners, should be charged with the observance of the laws, for the certainty of punishment, and not the severity of the penalty, is what prevents wrongdoing. Annual reports showing the value and amount of the business, the capital, assets, liabilities, net income after allowing for interest, taxes, depreciation, improvements, and operating charges, should be furnished to the commission. All such reports should be sent to the bondholders and stockholders, and should be published promptly if the securities are sold on stock exchanges, or offered to the public in any way. Discretion must be exercised not to publish information which might enable competitors to injure any concern.

All corporations engaged in interstate commerce should be required to obtain a license from the commission and to pay a registration fee of $10 for corporations with a capital and surplus under $500,000; of $50 for those from $500,000 to $1,000,000; of $100 for those from $1,000,000 to $10,000,000; and of $500 for those over that amount. These fees should be at the disposal of the commission for the purpose of investigation.

The assessment of the present corporation tax, and any other taxes that may be levied on corporations, should be transferred to the commission which should certify the tax to the Collector of Internal Revenue.

Federal incorporation should be granted to any corporation

that applied for it, and the terms of the law should be so clear that a charter should be issued as a matter of routine, though the commission should be required to approve the details, just as the Commissioner of Corporations approves the papers of Massachusetts corporations.

Such charters should not be amended without the consent of the stockholders for ten years, in order to give business a chance to adapt itself to the new conditions; though the charters should be forfeited for disobedience of the laws. Congress should retain, by the express terms of the charters, full control of the hours of labor of men, women and children, and the power to regulate employers' liability and safety appliances. It should also provide for insurance against death, old age, accidents, sickness, unemployment, and similar legislation for the welfare of the workers, such as must soon demand the attention of the nation, which cannot delay much longer in following the example of Germany and England. Constitutional difficulties could be avoided by proper wording of the articles of incorporation.

The powers which should be granted to the commission over the issues of securities form a difficult problem, owing to the inevitable conflict with state requirements. Although it is desirable that the same restrictions should be applied to all corporations as to those with Federal charters, yet, for the present, the main reliance must be placed upon publicity, letting the investors choose for themselves after examining the facts. It seems possible, at least, to prohibit all corporations licensed by the commission, which offer stock to the public, from issuing any stock, scrip or bond dividends, except as an incident to reorganization under the authority of the commission.

All issues of stocks or bonds of federal corporations should be under the control of the commission, and none should be issued without its authorization. It should further take measures to ascertain that the money thus obtained was properly spent, but should not regulate the price at which securities should be sold. That must depend upon market conditions. If they are sold below par, the difference would naturally have to be charged to profit and loss, and should be covered by annual deductions from earnings which should be credited to an appro-

priate fund. A similar provision should be made for the loss occasioned by redeeming bonds above par.

Shares without par value should be authorized by the commission in its discretion, but this expedient should not be adopted on a large scale until it has stood the test of experience.

The commission should have the right to order the physical valuation of corporations when this information is necessary to enable it to pass upon the assets behind securities. It should also be authorized to compel, not only the corporations under its control, but all other organizations with which they may have dealings, to produce what books and papers may be essential to enable it to perform its duties intelligently.

Industries existing under infinitely varied conditions cannot, without disaster, be forced into one rigid mould, therefore numerous alternatives to suit different necessities must be offered by any rational system of federal control of business. Choice should be free, the provisions for license should be as liberal as possible, and the more rigid provisions of federal incorporation should be willingly accepted as a fair concession to the demands of the public by any corporation which could not accommodate itself to the other alternatives.

In justice to existing corporations which are satisfied with present conditions, the Sherman law should remain unaltered, no matter how great the cry for its amendment, so that there shall not be any change in their status. The present rigorous enforcement of the law should be continued, and even inexorably extended as rapidly as possible to all illegal corporations. Under these conditions, no one can complain of unfair treatment, as business has had ample time to consider its position under the enforcement of the law, and relief for large combinations is provided by federal license and incorporation. It may, however, later be necessary to make federal incorporation compulsory for giant organizations.

Century. 83: 616-22. February, 1912.

Enforcement of the Anti-Trust Law. George W. Wickersham.

Discontent with the Sherman anti-trust law and its enforcement by this administration is not nearly so wide-spread as is popularly supposed. A few thoroughly discontented people are apt to make far more impression than do a host of people who are wholly satisfied with the same conditions which produce discontent on the part of the others. It is a reasonable assumption that the majority of the people who are discontented with the Sherman law and with its enforcement are the stockholders and others interested in those corporations and combinations charged with its violation. The people who will most benefit from the enforcement of the law are the great army of consumers who have been purchasing the products of these corporations. It is certainly obvious that the number of consumers so benefited must far exceed the number of stockholders who may, in some degree, be injured. But even in the case of the stockholders, the injury to them is greatly exaggerated. The purpose of the law is not to destroy industries. Because the courts have not sought to destroy property, some extremists have uttered loud complaint, but that fortunately will not lead the courts to change their course.

The Purpose and Effect of the Sherman Law

The real purpose of the Sherman law is to compel fair trade, to protect the average business man from injury due to unfair methods of competition. It is meant to keep the highways of commerce open to all, big and little, rich and poor, on the same terms. Therein lies its greatest ethical value. In the contemplation of our wonderful industrial development, the number of small producers who in the past have been forced to the wall by unfair methods has largely been lost sight of. The purpose of the Sherman act is to prevent undue combination and centralization of power, and therefore, in issuing their decrees, the courts have merely compelled the combinations against which they have been directed to resolve themselves into their integral parts. The property of the stockholders remains. It is as capable of production and of earning dividends as ever. It has been deprived

not of its legitimate earning capacity, but only of such unfair advantage as it acquired by illegal combination and restraint of trade. In the course of time these facts will become obvious to what has been referred to as "the great army of stockholders," and as I believe that the majority of them are not looking for an unfair advantage, so I believe their dissatisfaction will be abated.

There is of course some genuine discontent with the Sherman law, but I suspect most of it arises not so much from any real uncertainty as to its meaning as from a *realization* of that meaning. There are two classes of people who are directly affected by the application of the law and who are deeply dissatisfied with it. First, those who are in control of the great combinations,—such as were the Standard Oil and the Tobacco trusts,—who see in the law the absolute prohibition of a continuance of that centralized control over great industries which they have hitherto enjoyed. Second, comparatively small dealers, manufacturers, or producers, who either (1) have been concerned in various trade combinations for the purpose of keeping prices uniform, or of preserving the market for their commodities in a condition satisfactory to them; or (2) who are desirous of consolidating or combining with one another, and who have been led to believe, by the complaints of the class first mentioned, that the law is so uncertain that they cannot take any step without involving themselves in possible prosecution.

The Need of a Check to Monopoly.

I think every thoughtful person will agree that the Sherman act or some equally effective statute was absolutely necessary to check the growing centralization in a very few hands of the vast industries of the United States. It was the danger of that centralization which the leaders saw in 1890, when they framed and enacted the Sherman law. Senator Edmunds, in his recently published chapter on that subject in the "North American Review," points out exactly the danger those men foresaw—the menace to free institutions which they perceived in this growing power, and the curb they purposed to put upon it. Slowly, but irresistibly, the construction of the statute has been widened, until now it is demonstrated to be adequate to effect that great result. But, whether as a consequence of, or as incident to, that

centralization, whether in great combinations or not, it is a fact that in almost every line of industry in this country there have been, and to a large extent there still are, trade organizations of various kinds embracing comparatively small producers and dealers. Take, for example, the Window-Glass combination, which was the subject of prosecution by the Department of Justice some months ago. There, all the manufacturers of certain kinds of window-glass in the Ohio and Pennsylvania district united in a sort of association the object of which was to prevent real competition between its members, in that case not only to keep prices up to the level which they had established, but to force them much higher. It was undoubtedly a beneficial thing for the members of that combination, but it enormously increased the price to the consumer, and did it on an artificial basis. Neither the members of that combination nor of similar ones have any doubt as to the meaning of the Sherman act when applied to them. Their objection is to the certainty of the law, not to its uncertainty.

So, too, there are other organizations which have come to our knowledge (some of which have been dissolved as a result of the work of the Department of Justice) where the great number of producers have entered into a combination for the purpose of preventing the retailer from buying except through a middleman. I am convinced there is not the slightest doubt in the minds of the members of those combinations that the prohibition of the Sherman law applies to such organizations. Their complaint is with its certainty.

Combinations Which Benefit the Middleman

In a word, the great object of many of these combinations has been to prevent the consumer from getting the benefit of prices the wholesaler is willing to make, in order that a middleman may be supported. So the retailer, and ultimately, of course, the consumer, is saddled with the burden of a middleman, which is a purely artificial burden that would be eliminated by the force of the ordinary economic processes which would work in the community were not this artificial restraint interposed. One of the results which the Sherman law will accomplish, which must be beneficial to a large class, is to drive out the

middleman where the conditions are such that the middleman is not the natural economic result of the operation of the laws of trade. Naturally, the middleman does not view this result with satisfaction, and his cry is added to those of the members of the large combinations. He finds the law to be "so uncertain" as to make it difficult for him to carry on his business in conformity with the law, which, of course, he desires to do!

A Distinction Between Restraint and Expansion of Trade.

There is, however, a third class which, I admit, is probably confronted by genuine uncertainty. I doubt if this class is so great as is thought; but it exists, and its members are actual and honest. They are the owners of, say, two or more concerns engaged in the same or similar lines of business who desire to consolidate or combine their efforts, and the investors whom they invite to contribute to the combined enterprise. In making such a consolidation there is necessarily eliminated such competition as existed between them in the past. If the object of that combination is not the mere destruction of an existing competition, but the carrying on of the business under improved conditions, with economies of production and management, the combination cannot be said to be illegal. Nevertheless, there is an uncertainty in ascertaining the actual purpose. At the outset, this purpose is locked in the breast of the participants in the combinations. They may declare it truthfully or they may not; and, aside from what they say, it may be difficult for an outsider to decide truly and accurately whether or not the combination has for its object a restraint of trade or an expansion of trade. Subsequent acts, however, reveal the purpose, because men are presumed to intend to perform the acts which they do perform, and they are presumed also to intend the natural consequence of their acts; so that a combination which on its face might seem perfectly legal when made, might in its exercise develop a wholly unlawful purpose. Here is an uncertainty not so much in the law as in the effect, and the difficulty of applying the law obviously results more from uncertainty of fact than from a legal uncertainty. Those who are invited into such an enterprise, particularly at an early stage, feel the uncertainties attendant upon it, and with reason demand an authoritative method of determin-

ing at least whether the original organization is a lawful one, in order that they may know they are assuming no liability as to the past, and in order, too, that they may protect themselves in the future by watchfulness over the acts of their agents.

It must be remembered that in this discussion nothing will really suit the men who have built up the great trusts, and whose interests have been in the monopolization of great lines of industry, but some method of continuing in the future, with greater or less immunity from interference, the same power and control which they have enjoyed in the past.

How Uncertainty May Be Eliminated

In my opinion, the only effective way to eliminate all genuine uncertainty is through a federal incorporation act containing provisions adequate to meet the situation. Congress has recognized its *power* by asserting the right to interfere and control, and to that extent to regulate the conduct of interstate commerce by declaring what contracts, combinations, monopolies, etc., shall not be entered into. I believe it is time for it to recognize its *duty* to provide proper vehicles for the conduct of that commerce, so as to make unnecessary the combinations it has prohibited. In the past, Congress has left the whole law of association—the law of co-operation under corporate form—to the states. It has not only said that every state may create such corporations as it will; but that it may, on its own terms, exclude from the state corporations created by other states. This has necessarily led to the holding corporation, whereby the control over an industry, through comparatively small capital, can be exercised with ever-widening sweep and virtually without bounds. Congress should provide for the formation of corporations—which, after all, is nothing more than to regulate the rules whereby men may associate themselves in the conduct of interstate commerce—with limited liability, and with provision for the transfer of their interests in whole or in part without affecting the continued existence of the association.

Congress should provide for the creation of such bodies, should prescribe the rules under which they may transact their business, and should protect them in the transaction of that business in accordance with those rules. Then, and not until

then, will the problem be effectively solved. Such a law would remove all the scandal of corporate organizations, of inflated capitalization, of deceit of the public through lack of information or dissemination of misinformation, and would thus enable the business of the country to be conducted on a safe and sane basis. The federal corporation, being a creature of the federal law, would be entirely subject to federal control; and from time to time, as tendencies developed which seemed to run counter to the public interests, they could be checked by appropriate legislation. In the meantime they could be checked by appropriate regulation.

The Regulation of Prices

The suggestion as to the regulation of prices that I made at Duluth was predicated upon assumptions that I am not making here. It was, What would happen if the government should recognize and attempt to regulate by law the great combinations of capital which become large enough of themselves to dominate the whole of an industry? The moment the government suffers to exist a combination of producers so great that it fixes or has the power to fix prices at will, and the consumer has no share in fixing those prices, effective governmental control must necessarily provide a means of correcting that price-fixing by governmental interposition on the same lines that it has used in the case of the price of transportation, under the Interstate Commerce Act. Of course the practical difficulties in the way of such price-fixing are very great. The very idea is abhorrent to our theory of government; and yet, if we permit the existence of organizations or combinations of producers under such conditions that they can fix prices, there is no means of securing justice to the consumer except through the government's asserting its right to step in and dictate prices, or at least to require that they shall not be raised above reasonable limits.

The fixing of prices by the government is the logical and inevitable outcome of the policy of recognizing some trusts as good and of attempting to discriminate between good and bad trusts. The "good trust" is the combination which, having the power to crush out all opposition, does not exercise it fully, or does not exercise it so as to arouse general popular dissatisfac-

tion. Under the Sherman law alone, no such thing can exist. The argument made on behalf of the Northern Securities Company when its existence was challenged in the Supreme Court was that, while it did control two great, parallel transcontinental railway-lines, it had not exercised that control to interfere with competition between them; but the court said that the possession of the power was fatal to the organization, because it must be presumed that, whenever the holders of that power found it to their advantage to exercise it, they would do so, and that the existence of the power was a menace to the public. Therefore they struck it down.

In all this discussion I use the word "trust" to mean a combination so great as to amount to a potential monopoly. No absolute monopoly has grown up under the Sherman act. There always has been a small percentage of the business which was not acquired by a given combination. But a trust has within itself that power which will enable it either to become a monopoly or virtually to exercise all the control which would be inherent in a monopoly.

Federal Incorporation Should Be Optional

There are those who believe federal incorporation should be made compulsory, a prerequisite to the transaction of interstate commerce. I do not believe that, because I think that the desired end can be achieved by making it optional. It is not easy to work a radical change in existing conditions. Under those conditions securities in large amounts are outstanding in the hands of the public. A system has grown up with the tacit permission of the general government which cannot be changed in a short time without enormous economic depression. But the federal incorporation act should be made so attractive to legitimate industry as gradually, and perhaps rapidly, to attract those engaged in interstate commerce in a large way. All those who wish to combine or consolidate existing businesses which are more or less competitive, thus giving rise to questions as to the applicability of the Sherman law, would realize that federal incorporation would so greatly facilitate the legitimate conduct of that business that they would not be willing to forego its advantages.

On the other hand, the faithful and rigid enforcement of the Sherman law will soon demonstrate the folly of trying to carry on a business which is not legitimate. New enterprises would be formed under a federal incorporation law, and perhaps, after a time—five or ten years possibly—the conditions might become such that Congress could properly prescribe that after a given date no interstate commerce should be carried on by any corporation not organized under the federal law. My view has always been, however, that the federal incorporation law should not be applied to small concerns; that the great machinery of the federal government which it would be necessary to establish for such purpose ought not to be directed to little concerns that can be more properly organized and carried on in their own localities, although they may engage to a certain extent in business between the states.

As a rule these small concerns do not appeal generally to the public for their capital. The English Companies' Act discriminates between two classes of corporations: those which are more properly incorporated partnerships, with a comparatively small number of stockholders, which do not appeal to the public for their capital; and those larger concerns which require large amounts of capital, and which appeal to the public for funds by the offer of their stocks, bonds, and other securities. A far more rigid supervision, and more exact requisites as to filing statements and making public information, are imposed on the latter class than on the former.

The first result of the provision for such federal incorporation would be that those who are actuated by a desire to conform with the law, but who are sincerely in doubt as to its requirements, would promptly avail themselves of it. Others would rapidly follow, because the advantages of subjecting themselves to such federal control, and of submitting to such supervision and publicity, would include not only a practical insurance against prosecution under the Sherman law, but a stability of their securities otherwise unattainable. It is possible there would be no need for further legislation. On the other hand, Congress might find it wise, later, to make such incorporation compulsory in the case of all corporations doing an interstate business and offering their stocks or bonds for public sale. A

general compulsory statute would reach so large a number of small corporations whose interstate business was only incidental, or at any rate so inconsequential, that it might impose on them a wholly unnecessary supervision, and at the same time so clog the work of the federal government as to militate against thoroughness in those cases where effective supervision by the national government is absolutely necessary to prevent recurrence of evil conditions.

Competition a Natural Tendency of Commerce

Objection has been made that the disintegration of the Standard Oil Company and of the American Tobacco Company ordered by the courts was insufficient; that it would prove ineffective; that there is nothing to prevent the disintegrated parts of these industries from working together, even in the absence of any tangible agreement. But I suspect that where that objection is sincerely advanced it emanates from those who lack practical experience. Of course where it is not sincere it is merely one of the forms in which objection to the law by those who oppose its policy finds expression.

Theoretically there is nothing to prevent any two men or bodies of men engaged in competitive business from pursuing a similar course in the conduct of their respective businesses. But experience shows that where corporations have different boards of directors, different officers, different agencies for purchase and sale, and different officers and plants, the natural tendency of men to compete with one another *will* operate, and the fact that there is a community of stockholding cannot prevent that natural tendency. The history of the efforts that have been made in the last forty years to prevent that natural tendency is a demonstration of its existence. First, the control over, and the suppression of, competition were brought about by depositing the stocks of various competing companies in the hands of a body of trustees who selected the boards of directors and the officers of the various companies; and then, when that method was held illegal, the holding company was substituted for the board of trustees, and the officers of the holding company became in effect the officers of all the corporations whose stocks were held by it; so that a single central intelligence directed and con-

trolled the activities of all the parts. But without some such method it has invariably been found impossible for a general body of stockholders to control the policies and activities of different corporations. Moreover, while each of these companies may have to-day the same stockholders, in the same proportions, that identity begins to change the day after the distribution. Each of these stockholders receives certificates of fractional shares in different companies. He is certain to dispose of some shares in one company and to buy one or more in another, and the natural operation of the law of existence tends constantly to the disintegration of the original identity of stockholding.

Sincere inquirers should bear in mind that any specious pretext was sure to be seized upon by those persons who were opposed to any disintegration of the tobacco combination which would result in leaving a certain number of solvent, well-organized, well-equipped business concerns with which these objectors must come into competition, and from which they fear a real, not merely a simulated, competition.

It should also be remembered that such pretexts, advanced by those who are at heart hostile to the entire purpose and intent of the Sherman law, are too often seized by those who, lacking practical experience, are easily misled, and who, while sincerely in sympathy with the broad purpose of the law, are prone to indulge in theoretical and carping criticism of the effects of its application. In this way men who are perfectly sincere in their desire to see an effective anti-trust statute are often made the dupes of insincere and experienced men who profit by the general agitation thus promoted, and whose own purpose to undermine the law is greatly aided by the apparent harmony between their views and those of men of unquestioned sincerity. An example of this is found in the somewhat prevalent demand that the Sherman law be amended.

Effectiveness of Decrees against the Trusts

It is not at all likely that the average critics of the decrees in the Standard Oil, the Tobacco, and other trust-suits have any adequate appreciation of their restraining influence. Any attempt to violate those decrees would result not in protracted litigation, with the prospect of punishment—probably a fine—

somewhere in the dim and far distant future, but in an immediate summons to the participants to appear in court and answer to a charge of contempt. And unless those so summoned could disprove the charge, the punishment would be summary; in the case of a grave violation undoubtedly taking the form of imprisonment.

Much fault has been found with the process of injunction, and even now an attempt is being made to take from the courts the power to punish for contempt, or the disregard of an injunction, without trial by jury unless such contempt shall have been committed in the presence of the court. Probably the spectacle of some reckless manager of a trust violating an injunction and summarily committed to prison without extended litigation, trial by jury, or other process susceptible of being used to procure delay, would bring home to the man in the street more convincingly than any other argument the usefulness of the power of injunction and the present system of imposing penalty for its violation. But it is not very likely that such an example will be afforded, for lawyers who have not hesitated to advise their clients to take the chance of prosecution for violation of the Sherman law will be extremely chary of advising them to run the risk of imprisonment for contempt by violating an injunction of the court. It may be that only time will demonstrate the effectiveness of the injunctions which have been procured as a result of the prosecutions under the Sherman law, but the discerning may gather some idea of their effectiveness from the bitterness of the men who fear the effect of such injunctions buttressing a decree disintegrating a combination in which they are concerned, and who clamor for a repeal or amendment of the statute whose "uncertainty" of language gives them so great concern!

There is, in my judgment, no occasion to amend the Sherman law. That law is effective as it stands. To amend it would merely necessitate further judicial interpretation before it would be as clear and as enforceable as it is to-day, and would go far to destroy the good results of twenty years of judicial interpretation. But there is a possible method of amplifying that law by addition or supplement, not by amendment. For example, it has been proposed—and the President has stated that he sees no

objection to it—that the law might be supplemented by specifying some of the specific acts which have been adjudged by the courts to be embraced in the phrase "undue restraint of interstate trade," in order that merchants may have before them in codified form a clear enumeration of certain things they may not do, and be thus relieved of the so-called "glittering generality" of the statute. The difficulty of carrying out this suggestion will be found when the draftsman comes to write such a statute. I am inclined to think that formulating the various kinds of unfair trade and undue restraints of trade which would properly be included in such a statute will add little new to the popular understanding of the meaning of the Sherman act, although, as the President suggests in his message, it may result in shortening the task of the prosecuting officers of the government.

But there should certainly be nothing in any additions to the statute to enable a concern whose ingenuity had devised some new and unspecified method of destroying competition to plead immunity from punishment because that particular method of restraint of trade was not made the subject of express prohibition.

The Remedy Suggested by President Taft

The clarity with which, two years ago, President Taft foresaw the situation which confronts us to-day should command for the remedy he then proposed, and still urges, the respect of sincere and earnest men.

Substantially the views I have expressed here with regard to federal incorporation were embodied in President Taft's message to Congress in January, 1910. He pointed out then precisely what he foresaw would be the decision of the Supreme Court in the pending trust-cases against the Standard Oil and Tobacco companies, and indicated what the duty of the government would be in enforcing the law as it should be construed in those cases. Then he suggested, as the most effective remedy for the conditions of embarrassment which would probably result to those engaged in carrying on interstate commerce in a large way, the passage of a federal incorporation act, and he very clearly indicated in his message the advantages of such an act and the impossibility of any satisfactory solution of the problem without

such legislation. The decisions which were rendered by the Supreme Court justified the President's views; the situation which exists to-day is precisely what he predicted, and the remedy which he offered is to-day, in my opinion, the only practical, effective, and thorough solution that has been suggested by any one.

Annals of the American Academy. 42: 303-9. July, 1912.

Federal Incorporation of Interstate Corporations.

Ernest W. Roberts.

When the country was developing and business was preparing to branch out into the new fields that such development promised, it was only natural that business men should turn to the corporation as a desirable means of conducting their affairs, because of its limited liability to individuals and because of the further opportunity it afforded to secure needed capital. At the outset of the increase in corporate form of conducting business the several states apparently had in mind only that sound business laws were desirable. In a short time, however, it became apparent that the corporation was to be the largest individual form of commercial development, and certain of the states, this may be said in fairness, I believe, seeing an opportunity to increase their incomes, adopted less rigid forms for incorporation and began an open bidding for fees from organizers. The unavoidable result quickly followed. The corporations increased, the laws for their regulation became less and less desirable, and certain men who produced nothing have grown rich beyond the dreams of avarice through the workings of these laws. It is not the purpose of this address to criticise nor are these statements made from that standpoint. They are merely a recital of facts which, piled one upon another, have created the problem the people are now called upon to solve.

The federal government, because of the Constitution and its limitations, real and fanciful, has so far sat idly by and, with the exception of the Sherman law, has made no effort to curb these

activities. The Interstate Commerce Commission, created to deal with rates, is a valuable addition to our legal and administrative system; but to these must be added something supplemental—something which shall reach to the sore spots in our business existence that neither of these regulating agents has thus far touched, and I feel convinced that compulsory federal incorporation is what the situation demands, and will prove to be the remedy in which lies the cure for the situation as we now face it.

At present we have forty-eight separate jurisdictions, with as many separate and distinct regulating laws, dealing with the same problem in forty-eight different ways as best seems suited to the needs of the several states, regardless of the needs of the country as a whole. To put through uniform corporation laws in each of the states would be an utterly impossible task. The alternative is some regulation by the national government, and federal incorporation seems to be the easiest to accomplish and the quickest and surest in its benefits.

Other means of control have been suggested. Some hold out a form of federal license, others suggest a commission, similar in form to the Interstate Commerce Commission, having for its duties the regulating of business activities and prices.

I shall not comment on these suggestions other than to say that in my judgment either of them would necessarily abrogate to a certain extent the force of the Sherman law, and place in the hands of the executive branch of the government certain quasi-judicial functions. Such a disposition of the question is undesirable when unnecessary, and not to be made except as a last resort.

In the case of federal incorporation, however, these objections are eliminated. We there have simply a federal statute which defines in detail what a corporation shall do before a charter issues and just what it may do as to its financial activities after that charter has been made effective. It defines duties and obligations, prohibits certain things and prescribes in what way permissible things may be done. It makes no effort to name criminal liability for restraint of trade. It provides means for getting an entire publicity of all the business of the concern, and makes the activities of the Department of Justice in punishing the criminal trust simpler and more sure. It strikes at the

root of the present evils if of broad enough scope, and, above all, is immediate in its action.

Having this form of regulation in mind I have recently drawn a form of law which has been presented in the House of Representatives and which I shall take the liberty to discuss in detail for a few moments. I am frank to admit that my bill is based on the Massachusetts law which has stood the test of time and proven itself. Several of its provisions are taken as nearly as was possible word for word from the revised laws of the State of Massachusetts. In addition to those provisions I have added such further sections as seemed desirable until the bill presents sixty-seven sections and provides for complete publicity under the direction and control of the Secretary of Commerce and Labor and the Commissioner of Corporations. It distinctly prohibits the watering of stock or the issue of fraudulent or excessive or unsecured indebtedness. It states in express terms that no business shall be begun by a corporation until its entire capital has been paid in, either in cash or its equivalent in property. It further provides that no stock or scrip dividends shall be issued, that the Commissioner of Corporations shall first approve all issues of stock or bonds after the initial issue by the corporation, it permits the issue of employee's and special stock, it prohibits the issue of any forms of indebtedness which shall run for more than a year and whose total value shall exceed the outstanding securities and its paid-in capital and franchise value, it guards the issue of bonds, it prevents the sale of bonds at a less rate than par, but provides that a bond so sold shall be collectible at par by action in contract, it provides for the issuance, recording and transfer of stock, it has formal provisions for the management of the business of a corporation formed under it, it provides for the liability of officers and stockholders in certain cases, and provides for full publicity.

In addition to these general provisions the act is so framed that where penalties for violation of its several provisions are named they take the joint form of fine and imprisonment. There will always be found many willing to stand a medium fine if that is all standing between them and their desires, but few will care for the year's imprisonment which is added to the fine as a deterring influence. In an endeavor to limit the activities

of corporations a section has been included in the act which provides that a corporation going outside its chartered authority to conduct any business shall be dissolved, after hearing and action taken by the attorney-general.

The problem of how to reach the corporation now in existence which would be amenable to the workings of such an act was a serious one, but was met by a section which provides that failures to take advantage of the terms of the act by any such corporation shall result in a fine for the corporation which shall not exceed one-tenth of its total valuation and a penalty for the officers and directors of such corporation which takes the form of a fine not to exceed one thousand dollars and imprisonment for not less than one year. It prevents the formation of boards of interlocking directors, so-called, by forbidding a director in one corporation subject to the act serving as a director in more than four others, thus confining one man's activities in this line to five corporations, which does not seem unreasonably restrictive. It is also provided that the holding of the stock of another corporation shall be cause for dissolution. And by the final section it is provided that nothing in the act shall be construed as being an avoidance of any obligation or liability that may be imposed by the several states.

The scope of the proposed law is limited to those corporations engaging in any form of interstate commerce whose total valuation exceeds five millions of dollars. The problem in its serious phases is affected only by those corporations whose finances are so great as to make it possible for them to control commodities in price or to control a market, and practically only those whose resources are well above the amount named affect the money market or the economic situation. Smaller corporations can hardly be looked upon as a menace and combination of several of them brings the combined force under the proposed law.

The bill as framed deals with a situation simply. It affects in no particular the force of the Sherman law nor the functions of the Interstate Commerce Commission. It calls for no long investigations. It places corporations on record as to their financial activities and limits their business activities to the exact lines for which they were created. It leaves in the hands of the present forces of the government all the means they now have

and adds largely to the fund of knowledge they already possess as to the intimate workings of the "big business" interests.

It is to be expected that objections to such a proposed measure will arise and the greatest of these affects its constitutionality. Hours might be spent in a discussion of this phase of the situation. Suffice it to say for this short discussion of the matter that the same objections would lie to a federal commission or a federal license.

There is one statement which was made by Mr. Chief Justice Marshall, who has done more than any other single jurist to make the Constitution the great working governmental function it now is, which strikes me as being exactly in point: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." This was said in the case reported in 4 Wheaton at page 420 and has been many times quoted in other cases. It would appear almost too simple to need dogmatic demonstration that the power to produce, which would be given by the proposed law to a manufacturing corporation, is plainly within the unprohibited means referred to by the first Chief Justice.

It is quite impossible in a short talk such as this, to do more than touch upon the several things aimed at and hoped to be accomplished through legislation such as I have very briefly outlined. I want to say, however, that as a general proposition, competition will be found a very good regulator of prices. We must keep competition and we must also acknowledge that modern conditions tend to combination and that combination has been responsible for many of the advantages we as a people are now able to enjoy and which without combination would have remained luxuries to us as they were to our fathers. It might be well as a supplemental measure to describe just what is an illegal and unreasonable restraint of trade, although it would seem that the legal rules are so clear that this would hardly be necessary if the members of the legal profession were frank with themselves and with their clients. But it does seem to be necessary to prescribe some regulations under which enormous industries may be carried on. The men at the head of these

industries have asked for some such laws, as witness the statement of Mr. E. H. Gary, who said: "No decent man is desirous of violating the law or of doing anything which is inimical to the public interests. . . . Give us a commission to which we can go and say: 'Here are all the facts; here is what we would like to do; here are the probable results; we do not want to antagonize the law; we do not want to do anything we ought not to do; we want your advice.'" This proposed corporation law provides just what Mr. Gary asks for. All authority is found in the charter of every company incorporated under such a law as this. Its financial activities are limited by the terms of that law. Its business activities are clearly set forth in its charter. It does not have to go before a commission which may give it some authority it ought not to have or deny it something it should have. It merely does as the law says it shall do, no more, no less. A commissioner of corporations, who has no authority to assist it in any way as a legal officer, sits wholly on the facts. If the corporation oversteps the bounds of its clearly defined rights the matter is placed in the hands of the Department of Justice and action follows. It is not the purpose of such a law to make prosecutions under existing laws altogether unnecessary, nor to make it permissible to do these things now forbidden. It is proposed to establish a stated form under which all corporations may work, to lay before the people at all times the full workings of the financial end of the corporation and to make it possible for publicity to force upon those who would not otherwise accept it, a certain well defined sense of business morality which must work to the alleviation of present oppressive and undesirable conditions.

Conceding for the purpose of this discussion that incorporation is properly within the powers of Congress, is it not better to have a well defined law under which all business interests shall act than it is to have the administration of this department of governmental activity in the hands of a quasi-judicial commission that may sit in judgment on each case and make such decisions as will result in a further confusion of rights and obligations? With a corporation law there is no chance for the exercise of individual judgment to the detriment of one case and the advancement of another. With a corporation law

all the cards are on the table and the game is an open one for all men to enter, understanding clearly when they start that all are to play it according to the same set of rules.

The enactment of a federal incorporation law would clarify the atmosphere, would supplement the good work now being done by the Department of Justice, would do away with the financial evils which have given us panics in the past and hold out no better promise for the future, and would bring together in working harmony the great financial interests which under the present order of things seem bound to be more or less out of tune with the national government.

Review of Reviews. 50: 477-80. October, 1914.

Federal Trade Commission Bill. Francis G. Newlands.

The most important economic legislation required by the platform of the Democratic party at the last election was that relating to the tariff, banking, and the trusts. In less than a year the tariff and banking legislation was disposed of, with only the temporary disturbance to business which always accompanies economic changes. The causes of the disturbance were more psychological than real, but the human mind is so constituted that exaggeration, apprehension, and alarm are often as harmful as actualities.

The disturbed conditions of business led many to think that it would be well to postpone trust legislation until business had readjusted itself to the changed conditions; but the President, feeling that apprehension would be more prejudicial than realization itself, and that it would be better to put all economic legislation behind us, in order that we might address ourselves to the constructive problems of the future, pressed the subject upon the consideration of Congress. The wisdom of this course cannot, in my judgment, be questioned. Whilst the effects of world-wide complications are now being felt, it is with relief that we view the enactment of trust legislation and the inauguration of constructive, in place of correctional, legislation.

As chairman of the Senate Committee on Interstate Commerce it was my privilege to be brought into communication with the

President on this subject. Pursuing his usual policy as a party leader, the President, before making his recommendations, consulted the committees of the Senate and the House having jurisdiction over the subject-matter; and the result was that three tentative measures were framed: first, a bill supplemental to the anti-trust act, covering certain practises in trade and corporation management which had come under popular condemnation, as well as the labor and injunction questions; second, a trade commission bill, and, third, a railway securities bill.

The last-named was designed to give the Interstate Commerce Commission power to control the stock and bond issues of common carriers. It passed the House, was reported with amendments to the Senate, and is now on the calendar; but owing to the disturbed condition of the money and securities markets, it has been deemed advisable to postpone final action until the next session. Its consideration will not be taken up in this brief statement, beyond saying that the crucial question to be determined is, whether full publicity shall be relied upon to prevent the scandals in railway stock and bond issues that have characterized the past, or whether absolute control of the stock and bond issues of railway carriers shall be given to the Interstate Commerce Commission.

At the time this article is being written the so-called Clayton bill, involving the supplementary legislation referred to, is in conference between the two houses of Congress. In view of the important differences between the House and the Senate bills, it is not possible to predict with certainty its final form. It is safe to say that the bill as finally passed will cover prohibitions as to tying contracts, intercorporate stock holdings, and interlocking directorates in competing companies, and corporate purchases of supplies in which corporate directors or officers are interested, as well as the exemption of labor organizations from the condemnation of the anti-trust acts, the modification of the law regarding injunction and contempts of court, and the personal punishment of directors, officers, and agents of corporations whose violation of the anti-trust laws they have aided or abetted.

I believe that the long and exhaustive consideration of this subject by the committees of the House and Senate, and by the

two houses themselves, will result in the enactment of legislation from which great good will flow in the promotion of fair dealing, the advancement of business honor, and the recognition of the fact that labor is not merely an economic but a human problem. We can await with patience and confidence the outcome of the deliberative processes through which this bill has gone.

With reference to the Trade Commission bill, it is possible to speak with greater certainty and detail. The two houses adopted the conferees' report without opposition, and the bill became a law when it was signed by the President.

Interstate Commerce Commission Furnished a Model

I was greatly gratified when the President included in his message a recommendation for a trade commission bill. Having served in the House and Senate a period almost commensurate with the life of the Interstate Commerce Act and the Sherman Anti-trust Act, I had observed the steady, continuous, and consistent enforcement of the former under an almost unchanging commission, as contrasted with the changing, inconsistent, and spasmodic enforcement of the latter under the shifting incumbency of the Attorney General's office, and had long since concluded that the only way of securing the adequate enforcement of the Sherman law was through a commission with powers of investigation and condemnation similar to those of the Interstate Commerce Commission.

The matter had become so clear in my own mind that after repeated discussions of the subject, on the 11th of January, 1911, I summed up my conclusions in the Senate in the following words:

> The railroad commission bill furnishes a model for the action of Congress upon matters involving minute and scientific investigation. Had we followed the same method regarding trusts that we followed regarding railroads, we would have made much better progress in trust regulation. The anti-trust act was passed twenty-one years ago, about the same time that the railroad commission was organized. The railroad question is practically settled; the settlement of the trust question has hardly been commenced. Had we submitted the administration of the anti-trust act to an impartial quasi-judicial tribunal similar to the Interstate Commerce Commission instead of to the Attorney General's office, with its shifting officials, its varying policies, its lack of tradition, record, and precedent, we would by this time have made gratifying progress in the regulation and control of trusts, through the quasi-judicial investigations of a competent commission and through legislation based upon its recommendations. As it is, with the

evasive and shifting administration of the Attorney General's office, oftentimes purely political in character, we find that the trusts are more powerful to-day than when the anti-trust act was passed, and that evils have grown up so interwoven with the general business of the country as to make men tremble at the consequence of their disruption.

Debated under Two Administrations

Pursuing the convictions thus expressed, I introduced, on July 5, 1911, Senate bill No. 2941 for the creation of a trade commission, and subsequently, on the 21st of August, 1911, introduced a substitute for it bearing the same number. About this time the Senate Committee on Interstate Commerce, under the chairmanship of Senator Clapp, entering upon an exhaustive investigation of the necessity for further trust legislation, held hearings (in which more than a hundred witnesses gave their views) and published testimony covering nearly three thousand pages; all of which was carefully digested by the Bureau of Corporations. During this investigation the bill which I had introduced was carefully considered by the committee and amended and improved, but was not reported, the committee concluding not to report a bill, but simply to report generally upon the subject.

The report of the majority, prepared by Senator Cummins, was a clear and powerful statement of the arguments in favor of a trade commission. Later, on the 26th of February, 1913, in the closing days of Mr. Taft's administration, I introduced the bill as amended and improved by the Senate Committee (Senate bill 5485) and later, on the 23rd of April, 1913, in the early part of Mr. Wilson's administration, I reintroduced the bill (Senate bill 829). The bill thus evolved, though differing in detail in the various drafts, covered practically all of the matters embraced in the Federal Trade Commission bill as finally enacted, including even in the draft of August 21, 1911, the condemnation of "unfair methods of competition,"—a provision which was subsequently revived in the bill as enacted. This bill later became the basis of the present legislation, and with reference to it Mr. Clayton of the House of Representatives caused to be printed in the Congressional Record the following statement:

The bill will be introduced at the same time by Representative Clayton and Senator Newlands. The bill is modeled after the lines

of what is commonly known as the Newlands bill, which was introduced in the Senate by Senator Newlands, and involves the fundamental idea that a trade commission shall be created, consisting of five members, with full inquisitorial powers into the operation and organization of all corporations engaged in interstate commerce, other than common carriers. It provides for a commission of five members, makes the Commissioner of Corporations chairman of the board, and transfers all the existing powers of that bureau to the commission. Its relation to the Attorney General's office and to the courts is advisory. Its principal and most important duty, besides conducting investigations, will be to aid the courts, when requested, in the formation of decrees of dissolution, and with this end in view it empowers the courts to refer any part of pending litigation to the commission, including the proposed decree, for information and advice.

I may add that the tentative bill thus introduced was made the subject of the most exhaustive study and hearings by the committees of the House and Senate, the Covington bill, a modification of the Clayton bill, being reported to the House, and the so-called "Newlands bill" being reported in the Senate. The Newlands bill was substituted in the Senate for the Covington bill, previously passed by the House, and in conference a bill, a composite of both bills, was reported and was confirmed by both Houses.

I have thus gone over, at the risk of being tedious, the history of the genesis and the development of this legislation in order to show that the bill was not the result of hasty action, but was the evolution of investigation, deliberation, and debate under two administrations, such as few bills have received, and the final vote in both Houses,—unanimous in one and nearly unanimous in the other,—indicates that it is the product, as all legislation should be, not of partisan zeal or violence, but of a sound public opinion.

What the New Commission Can Do

As to the powers of the commission. Briefly stated, they relate to investigation, to the condemnation of unfair methods of competition, and to the aid of the Attorney General and the courts in the enforcement of the anti-trust acts.

The merger of the Bureau of Corporations, with all its officials and powers, in the Federal Trade Commission, insures the preservation of the accumulated experience and knowledge of that useful organization. The creation of a commission, with varying terms for the first appointees, and thereafter a fixed term of seven years for their successors, guards against sudden

changes in the personnel of the commission, and insures stability, consecutiveness, and persistency. Its independent character insures against political, legislative, or executive control, and makes it a quasi-judicial tribunal of great dignity.

It will not be subject in its policies to the influence of party mutations, or to the control which slows down or accelerates prosecutions with a view to political exigencies. It will do away with the office adjustments of the Attorney General's office, which, whilst doubtless conducted with propriety by the incumbents, arouse the suspicion always created by so-called star-chamber proceedings. Everything now will be done in the open, in the public eye, after hearing and argument to which all may have access. No one can question the effect of such dignity and publicity of procedure upon the public mind, now keenly sensitive and perhaps unduly critical.

The general powers of investigation are applied only to corporations, the creations of the law, artificial beings owing their existence to the law-making power. It was not thought wise to extend the general power of investigation to individuals and firms engaged in interstate commerce, lest the commission should break down under its burden, and also because the organizations and prices complained of are generally of a corporate character.

While the powers are necessarily broad, none but the guilty need fear, just as none others need fear the criminal code, which is applicable to all and with reference to which the extraordinary powers of grand and trial juries may be invoked. These powers are contained in section six, which authorizes the commission to gather and compile information concerning, and to investigate the organization, business, conduct, practices, and management of, corporations engaged in commerce, except banks and common carriers; to require such corporations to file annual or special reports, and to furnish the information required; to investigate the manner in which decrees are carried out, and to report its findings and recommendations to the Attorney General; to investigate, upon the direction of the President or either House of Congress, and to report regarding alleged violations of the anti-trust acts by any corporation; to investigate, upon application of the Attorney General, and to make recommendations for the readjustment of the business of any corporation

alleged to be violating the anti-trust acts, in order that it may thereafter conduct its business in accordance with law; to make the information which it collects public in its discretion, except trade secrets and names of customers, and to make annual and special reports to Congress with recommendations for additional legislation; to classify corporations and make rules and regulations for the enforcement of the act; and to investigate trade conditions in and with foreign countries, where associations, combinations, or practices of manufacturers may affect our foreign trade, and to report thereon to Congress.

These powers are only slightly greater than those which the Bureau of Corporations has had and which have never been used oppressively. It is not believed that the commission will find it necessary to investigate many of the corporations engaged in interstate commerce. The powers must be general, but their exercise will necessarily be limited to the few corporations which are violating the law.

Section seven of the bill gives the commission additional power to aid the courts, by providing that in any suit in equity under the anti-trust acts the court may refer to the commission the question of the form of the decree to be entered. In such a case the commission is to act as a master in chancery, and proceed in due form, under rules laid down by the court.

The additional powers given the commission, not directly in aid of the courts or of the Attorney General, are, first, the power to prevent unfair methods of competition, with respect to which it may initiate proceedings and make orders, enforcible through the courts; second, the power conferred by the Clayton bill to enforce the prohibition of intercorporate stockholding and interlocking directorates, so far as relates to corporations other than banks and common carriers.

Dealing with Unfair Methods

The provisions relating to unfair trade practises, in section five, provoked the sharpest debate. The language used is, that "unfair methods of competition in commerce are hereby declared unlawful"; and the commission is empowered and directed to prevent the use of such methods by "persons, partnerships, or corporations, except banks and common carriers." Parties under

investigation are to have a hearing, after due notice. If the commission finds adversely, a copy of the findings must be served upon the guilty party. If the order of the commission is not obeyed, it may be enforced through the circuit court of appeals, which thereupon has exclusive jurisdiction; but the findings of fact by the commission are made conclusive, though provision is made for remanding the case to the commission for additional evidence upon proper cause being shown. An appeal to the same court may also be taken by any party affected by an order of the commission.

In the course of the long and earnest debate on the floor of the Senate, it was insisted that there should be some definition of the unfair practices at which this legislation is aimed. Perhaps the best answer to this contention was that contained in the statement of the House conferees, who said:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.

The question as to court review of the commission's orders brought out wide differences of opinion. Individually I saw no necessity for anything but a provision expediting the proceedings in the courts. I had no doubt that when the commission brought its suit to enforce its order the court would, without express direction, determine, first, whether the order violated the constitutional rights of the party affected; second, whether the order was within the authorized power of the commission; third, whether the facts found by the commission constituted the legal offense charged. I regard the compromise provision framed by the conferees as meeting this view, for it makes the findings of the commission as to the facts, if supported by testimony, conclusive.

The remaining sections relate to details of administration, penalties, etc. The commission or its authorized agents are, at all reasonable times, to have access to any documentary evidence

of any corporation being examined or proceeded against, and the right to examine and copy the same, and it may summon witnesses and compel their attendance. Adequate penalties are provided.

As to the effect of this legislation upon the business of the country, I believe it will be beneficial. The Federal Trade Commission, composed as it will be of eminent lawyers, economists, and business men, will gradually, with reference to trade, as the Interstate Commerce Commission has done with reference to transportation, build up an administrative system of law and establish a code of morals that will bring certainty, peace, and security to the business world. Under it great corporations will be brought in harmony with the law without the violent readjustments prejudicial to the business interests of the country. A commission of this kind will be instructive rather than punitive, and helpful rather than disturbing.

Independent. 80: 116-7. October 26, 1914.

Federal Trade Commission.

The indefatigable administration has added to its legislative achievements in the tariff and currency and banking reform, the completion of two-thirds of its trust program. The Trade Commission bill and the Clayton anti-trust bill have been past by Congress and signed by the President. Next week we shall return to the second of these acts; it is the first that we here consider.

The Trade Commission act does five things:

First, it establishes a Federal Trade Commission similar to the Interstate Commerce Commission.

Second, it transfers to this Commission—and elaborates—the duties and powers of the Bureau of Corporations in relation to the investigation of the affairs of corporations, and of business methods and practices in general and in particular.

Third, it makes the Commission an accessory to the courts for the preparation and execution of their decrees in anti-trust cases.

Fourth, it empowers the Commission to make, thru the At-

torney General, recommendations for the readjustment of the business of any corporation in order that the corporation may not violate the anti-trust law.

Fifth, it entrusts to the Commission the prevention of unfair competition.

The creation of a Trade Commission is good. In so far as it avails to substitute administrative regulation of business for regulation by lawsuit it is a substantial step in the right direction.

The provision for more thoro publicity in relation to big business is a recognition of the right principle—the corporation which is not willing to conduct its business under the full light of day has little claim to public consideration.

The attempt to avoid the necessity of suits under the anti-trust act by enabling the Commission to suggest methods of reorganization thru which a corporation may cease to violate or remain from violating the act is perhaps the most admirable thing in the present measure. But it does not go far enough. It should be made possible for the officers of corporations who have every desire to obey the law, but who are uncertain just what they may lawfully do and what they must not do, to seek of their own motion the assistance of the Commission with the certainty that they will get it.

Most business men are law abiding citizens not only in their private but in their corporate capacities. But it has long been subject for complaint that there is a broad twilight zone about the region where the Sherman act reigns in which even the most law-abiding corporation is likely to lose its way. Such a corporation should be able to secure from the Commission suggestions as to the modification of its business methods and practises with a view to compliance with the law. The adoption of those suggestions by the corporation should create, in the event that the corporation were proceeded against under the anti-trust law, a rebuttable presumption that the corporation was not guilty of violating the law.

The number of corporations whose operations tend to be detrimental to the general welfare thru the stifling of competition and the fostering of monopoly is but small in proportion to the whole. The way of the well-intentioned corporation should be made as smooth as the way of the evil-purposed corporation

should be made rough. Encouragement and coöperation should be the portion of every corporation that is honestly seeking to do the right. Without that coöperation it cannot prosper; and unless business prospers we all are bound to suffer.

Lastly, the provision against unfair competition is sound. Competition is a natural force in the economic world, fast rooted in the very nature of man himself. Men compete because they seek prosperity. So long as they compete fairly, honorably, and with a decent regard for the rights of others, competition is eminently desirable. It is perfectly possible to compete fairly. But when men begin to ignore the rules of the game, to overstep the bounds of fair play and honorable dealing, competition quickly tends to become an instrument of oppression.

Recent events in the realm of trust development have shown how unfair competition may be used by the strong to put down the weak, by the unscrupulous to trample upon the honorable. Where could a man be found anywhere so unabashed as openly to defend unfair competition? Not even those who practise it in secret would dare to commend it openly. Excellent as it is to have a giant's strength, it is tyrannous to use it like a giant.

With the categorical prohibition of unfair competition no right-minded man can quarrel. With the plan for enforcing the prohibition thru the Trade Commission every one who wants efficiency of regulation in the business world and deprecates the laborious processes of administration thru the courts will find himself in accord.

On the whole the Trade Commission act is a sound addition to the body of federal law dealing with corporate activities. It is conceivable that time will show directions in which it has gone too far. We are certain that it will presently appear, as we have already suggested, that in at least one direction it has not gone far enough. But in its general tenor, it is a good act.